Legal Issues on Burma

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Special Feature

Burma Lawyers' Council
PO Box 29
Hua Mak Post Office
Bangkok 10243 Thailand
<blcsan@ksc.th.com>
<blcms@cscoms.com>
[www.blc-burma.org]

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Contents

Moving In Two Directions: Where Is Burma Headed?

*Josef Silverstein**

The year, 2003, will be remembered for two events: the Depayin massacre and the Burma road map. In May, the junta permitted Daw Aung San Suu Kyi and members of her party to travel into northern Burma and engage in political activity; then, on May 30, as her party was peacefully returning to Rangoon, it was viciously attacked. The military rulers offered an unbelievable and unacceptable explanation of what had occurred. They accused the victims, Daw Aung San Suu Kyi and members of her party, the National League for Democracy (NLD), of initiating the attack to which the people who support the government retaliated. Not only was it quickly established that the minions of the ruling junta beat and killed her supporters, they also tried very hard to attack and murder her as well. Most of the world quickly condemned the military junta, several states placed new political and economic restrictions upon Burma. Despite the world's outrage over the affair, the Burmese rulers took no steps to form an inquiry commission and seek to ascertain and report in full what had happened, why it happened and what the government did in response. Instead, it relied upon Art. 2.7 of the UN Charter, which declares that nothing authorizes the members of the UN "to intervene in matters which are essentially within the jurisdiction of any state..." and has said no more.

Three months later there were important changes in the ruling junta. On Aug. 25, Gen. Khin Nyunt, was appointed Prime Minister, and while Burmese and outside observers argued whether it was a promotion, as it was one of the offices Sen. Gen. Than Shwe, the head of SPDC—the ruling body—previously held, or a demotion because Gen. Khin Nyunt

gave up the office of Secretary-1 in SPDC—which made him third in ranking among its member. The move overshadowed the fact that there were four other personnel changes in the ruling group. Five days later, the new Prime Minister gave his first speech and used it to announce a road map to political change in Burma. His announcement surprised the nation and caught the world off-guard; it abruptly shifted the dialogue amongst friendly and hostile nations alike from their focus upon the brutal assault to an outline of how Burma intended to move peacefully from military dictatorship and martial law to constitutional democratic rule

Since both events were initiated by the military rulers without warning, they appear to suggest that the oft-rumored split amongst the members of SPDC may now center on two issues: what to do about Daw Aung San Suu Kyi and the National League for Democracy (NLD) and political change as factions within SPDC struggle to lead the nation down different roads; do the events of 2003 reflect more than a split in tactics amongst the leaders? Are they still united in the goal to remain in power at any cost? While these and other question hold the world's attention and the Burmese people continue their forced march down the road of permanent dictatorship?

The Depayin Massacre..

The world was shocked by the attack upon Daw Aung San Suu Kyi at Depayin; its causes and expected gains for the soldiers in power are still unclear despite the efforts of governments, diplomats and journalists to get all the facts and understand who was responsible and why such a massacre was perpetrated. To the friends of Burma, it is especially puzzling as they remember that a year earlier, the military rulers made a great show of releasing Daw Suu Kyi from house arrest and informing the Burmese and the world beyond that she was free to do whatever she wished, to move about, talk and meet whomever she wanted. On May 6, 2002—the day of her release—Lt. Col. Hla Min, made the government announcement,

> "Today, marks a new page for the people of Myanmar and the international community...We shall recommit ourselves to allowing all of our citizens to participate freely in the life of our political process, while giving priority to national unity, peace and stability of the country as well as the region".

Daw Suu Kyi almost immediately tested the government's sincerity by making trips to areas beyond Rangoon in order to reconnect with leaders and members of her party and revive their involvement in working for po-

The new Prime Minister gave his first speech and used it to announce a road map to political change in Burma. It abruptly shifted the dialogue amongst friendly and hostile nations alike from their focus upon the brutal assault. Do the events of 2003 reflect more than a split in tactics amongst the leaders?

litical change. Yet, a year later, the military turned its attack bullies on the peaceful homeward return of a caravan of her party members with the obvious intent of putting an end, once and for all, to their political opposition.

Why did this happen and how does it relate to Lt. Col. Hla Min's declaration?

Thus far, there are no clear answers. The only public statement about the event made by the military was that Daw Suu Kyi's meetings and statements were inflammatory and together with her followers' actions, provoked the attack which befell them. The government's spokesperson declared that only four persons were killed and fifty were injured. Today, neither the people in Burma nor the world beyond believe that government statement; at the same time, the ruling junta has made no effort to hold an official inquiry or allow an investigation by a responsible independent international body to come to Burma and report its findings. Immediately after the incident at Depayin, the US Embassy sent its own staff members to examine the area of the attack and interview any at the location with knowledge of what happened; it released its findings almost immediately. Other embassies, independent journalists and the Special Rapporteur for the UN Human Rights Commission sought to uncover the truth of the event but only Mr. Pinhiero was able to talk to government officials and learn what they had to say and written..

What happened at Depayin may never be fully known; however, the most responsible report, [in the judgement of the writer] was made by UN Human Rights Commission Special Rapporteur, Paulo Sergio Pinheiro. He wrote it after he made his last visit to Burma on Nov. 3-8 and submitted it to the Human Rights Commission in Geneva on January 4, 2004. His report was based on meetings and discussions with senior military leaders, Daw Aung San Suu Kyi and U Tin U of the NLD, other victims, bystanders to the incident and others with whom he talked. Some of what he reported and conclusions he drew are the following:

- the government officially investigated the Depayin Affair and wrote a report, but never circulated or made it public. He requested and was given a copy of the unpublished report.
- from what he saw and heard, "he is convinced that there is prima facie evidence that the Depayin incident could not have happened without the connivance of State agents."
- he reported that "...as pro-Daw Aung San Suu Kyi rallies were growing larger, in particular in the period between 25-and 30 May 2003, there was an escalation of threats, provocations, harassment, intimidation, bullying and orchestrated acts of violence

"UN Human Rights Commission Special Rapporteur is convinced that there is prima facie evidence that the Depayin incident could not have happened without the connivance of State agents."

with the involvement of those opposed to NLD and/or those who had some connection to Government affiliated bodies..."
on the day of the incident... "At about 7 p.m., the motorcade, comprising at least around 11 cars and 150 motorcycles left the village of Saingpyin and headed for Depayin.

"By the time they arrived near Kyee village, at around 7.30-8p.m., it was getting dark. Testimonies state that two or more monks, or people dressed as monks, appeared in front of the motorcade and asked Daw Aung San Suu Kyi to address the people. Violence erupted when approximately 50 people riding in a truck that was tailing the motorcade began to attack the convoy. They were joined by others from more than 10 buses and trucks, each carrying 30-40 people that had been following the convoy since it left Butalin, their headlights on lighting up the scene. The motorcade seemed to hesitate; then, as if on command, the people dressed as monks began to smash the vehicles' windows with bamboo stakes, including the vehicle in which Daw Aung San Suu Kyi was riding. The truck drivers seemed to have been forced by local authorities to participate.

"The attackers were civilians and wore white armbands, including the ones dressed as monks. People wearing such armbands had been seen prior to the incident in a smaller village and photos of the site of the attack taken a few days later show white armbands strewn around the field. There seemed to have been one or more leaders giving orders to the attackers. The violence was directed both against those in the convoy and the 200-500 villagers who had gathered to greet Daw Aung San Suu Kyi and her party. Some of those in the convoy stayed in their cars and some got out of their cars and tried to hide in the fields; both groups were attacked. The attackers used sharpened bamboo and wooden stakes and iron rods. The attackers also hit people with stones, reportedly harassed women, ripped off their blouses and stripping off their jewelry, and also took people's personal belongings from the cars. The attackers reportedly shouted, "Do not call us Kyantphut any more" Kyantphut being a derogatory term used to refer to members of the Union Solidarity and Development Association (USDA) a pro-government mass organization. According to testimonies, there were between 50 and 70 people lying on the road, either injured or dead. By 9 p.m., the violence ended.

"It is reported that after the situation had calmed down, about eight vehicles, including trucks, arrived at the site of the incident. Their passengers covered the bodies with blankets and put them on the trucks. Some of those removing the bodies were allegedly wearing military uniforms. They also cleaned the road with branches they ripped off nearby trees."

"Daw Aung San Suu Kyi was traveling at the front of the motorcade

in the cab of a pick up truck with two other persons; more people were in the open bed of the truck. When the truck was attacked, one of her companions pushed Daw Aung San Suu Kyi's head down and covered her with his body while the driver pushed onto Ye-u, a town beyond Depayin.. At the entrance they were stopped by a bar across the road.

"Daw Aung San Suu Kyi and her companions were then taken to Ye-u police station where they remained in what appears to be a guest room until 1 a.m. Later that morning, she was told that arrangements had been made to take her somewhere else. At that point she realized that U Tin Oo and some of the others from the convoy who had been left behind were at Ye-u as well. When she refused to go without the others, police-women carried her to a car. They started driving, stopping twice, first at the 6th Tank Battalion rest room and then at an army guest house in Minbu. They drove for 24 hours, reaching Insein prison at 8.20 a.m. on 1 June. There she was kept in a small house in the prison compound until 24 June, when she was moved to Ye Gaung Yeiktha in Ye-Mon army camp.; She left the camp on 16 September, when she went into hospital for an operation. She remained in the hospital 10 days and returned home on 26 September."

When the peoples of Burma and the international community learned that she was home and later, that she was free to leave her house, the international press began to lose interest and turned its attention elsewhere. But for the peoples of Burma, the situation did not return to normal. Daw Aung San Suu Kyi refused to accept her "release" until other leaders, such as U Tin U, also were released and all were free to resume their normal activities. As this is being written Daw Suu Kyi and the other leaders still are confined under house arrest.

Mr. Pinheiro concluded his report of the event with the observation that,

> "Effective redress of the human rights violations that occurred during the incident would provide a moral compass to guide the country forward on the path to national reconciliation and democratization. It is not a question of seeking revenge, or taking a partisan political stance.
> Missing this opportunity for reconciliation could lead to more negative developments. The Special Rapporteur therefore proposed to SPDC that he conduct an independent assessment of the Depayin incident under his mandate, or assist in carrying out a full and independent inquiry."

The Special Rapporteur therefore proposed to SPDC that he conduct an independent assessment of the Depayin incident under his mandate, or assist in carrying out a full and independent inquiry.

Apparently, the new page that Lt. Col. Hla Min reported had been opened was closed when Daw Aung San Suu Kyi used her freedom to travel widely and reawaken national interest in politics. It brought ever larger crowds to see and listen to her and the military rulers must have realized that she and not they were the object of the publics' attention and affection. It seems likely that the military rulers hastily turned to another page.

The Burma Road Map.

Even as the world's interest in Burma affairs remained seized by the Depayin Affair, the Burma military rulers refocused their gaze at the end of August when they made important changes in political leadership with Gen. Khin Nyunt's replacement of Sen.Gen. Than Shwe as Prime Minister as the most significant. While diplomats and commentators alike tried to understand the meaning of the changes, five days later, the new Prime Minister drew the world's attention by giving his first address and ending it with an announcement and brief discussion of the road map to political change the government intended to follow. For some time, various states, NGOs and foreign political leaders had been suggesting road maps to political change and had been urging the junta to announce a plan of its own or adopt one of their suggestions and set it in motion. Spokespersons for the Burma junta contended that such suggestions and offers of aid by others, in both devising a road map and helping to put it into play, were "interference in Burma's internal affairs" and contrary both to the UN Charter and the Asean Way and would not comment upon them. Once Burma put forward its own plan, Thailand dropped its suggested road map, gave full support to the plan of the Burma Prime Minister and sought to rally other nations to join him.

General Khin Nyunt announced his road map as part of a larger address which he delivered to a domestic audience drawn from members of his government, military leaders and at least two members of the SPDC. Neither members of the diplomatic community nor the public were invited to attend.. He devoted the largest portion of his remarks to reviewing the state's accomplishments since the military seized power. With this as a reminder of what they have done thus far, and having said nothing about the Depayin affair, he closed his address by announcing the government's next mission—transforming Burma into a disciplined democratic system.

Khin Nyunt framed his proposal with the reminder that Burma is a multi-nation state of "over 100 nationalities that have lived together in

unity and harmony for thousands of years, it is a nation that is striving with highest priority to build national unity and repeated the watchwords of the Tatmadaw: non-disintegration of the Union, non-disintegration of national solidarity and perpetuation of sovereignty, "as the national policy of the country." He reemphasized this thesis by declaring that "the most important factor in building a new, peaceful, modern, developed and democratic nation is the emergence of a **disciplined** [emphasis added] democratic system that does not effect the historical traditions of the Union...and that does not effect the national prestige and integrity of our people and nation; and that does not effect the national characteristics of our people." He never specifically said what he meant by "disciplined", although he used the term twice; he apparently did not need to as the audience understood. If any didn't, his summary of Burma's history under military rule—its economic and social accomplishments under order it imposed in 1988 and maintains over most of the 50 million people living in Burma—should have made it clear. If any still didn't understand or had any doubt where the new Prime Minister intends to lead the nation, he said in closing,

> "...it is very important to advance along the national path without deviation by firmly embracing patriotism, national spirit, spirit of national unity and Union spirit for the perpetuation of the Union in its march toward the national goal of a new peaceful, modern, developed and democratic state for the long term interest of the state and all the people."

The Khin Nyunt road map offers seven steps to political change. It begins with the reconvening of the National Convention (NC), an institution which the military created in 1992 and allowed to remain active until 1996.

2. A "step-by-step implementation of the process necessary for the emergence of a genuine and disciplined democratic system."

3. "Drafting of a new constitution in accordance with basic principles and detailed basic principles laid down by the National Convention.

4. "Adoption of the constitution through national referendum.

5. "Holding of free and fair elections for Pyithu Hluttaws (legislative bodies) according to the new constitution.

6. "Convening of Hluttaws attended by Hluttaw members in accordance with the new constitution.

7. "Building a modern, developed and democratic nation by the state leaders elected by the Hluttaw; and the government and other central organs formed by the Hluttaw."

Even as he spoke, the first steps onto his road map had been taken. The government reassembled the three leadership bodies of the National Convention, the 18-member National Convention Convening Commission under Lt Gen. Thein Sein, Secretary-2 of SPDC, which is charged with overseeing the drafting of the Constitution; the 35-member National Convention Convening Work Committee; the 43-member National Convention Convening Management Committee. In the report of the Special Rapporteur, Mr. Pinheiro noted that there were no representatives of the NLD, other political parties or the ethnic minorities on any of the three committees.

The Special Rapporteur's January 4, 2004 Report said that he was informed that the new NC will start where its predecessor left off, building upon the 104 Principles adopted in 1993 and all political parties will be able to participate equally in the Convention as one of the eight eligible categories of participants. Mr. Pinheiro also wrote that in answer to his specific question regarding NLD participation, he was informed that NLD would be expected to take part in the National Convention and it was now up to NLD to come forward and join the process. Gen. Khin Nyunt gave no indication that the government would recognized the overwhelming victory of the NLD in the 1990 election and that it would count for something in the new NC. The Special Rapporteur observed that "the process of the National Convention has yet to embrace those elements that are conducive to a genuinely free, transparent and inclusive process involving all political parties, ethnic nationalities and elements of civil society.

So little is known about the stops along the road map, it is impossible to know if its goal can be reached. All who have read and studied the map make the same first observation—it has no time table. Since it has taken sixteen years since the military seized power in 1988 to get to this point, it seems unlikely that the road to a disciplined democracy will be completed anytime soon.

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The first step appears complete; what other principles are left to add if the NC must begin its work where its predecessor left off? There seems to be little for it to do. The original NC made certain that the military would dominate the future government in the executive and legislative branches. The military must have a quarter of the seats in the new Pyithu Hluttaw and the hluttaws at the levels below; it also excluded the military budget

from review by the civilian members of parliament. Although the principles adopted by the first NC acknowledged the subdivision of the country into fourteen parts—the same as before the military seized power in 1988—the previous divisions will be called regions and the states will continue to use the names given to them in 1974. The new political system will not be federal; instead, to satisfy the ethnic minorities who have struggled for so long to achieve some form of self government and right of self determination, the constitutional principles adopted call for subdivision of states and regions into self administered areas and allotting them to peoples of the same race who reside together in common stretches of land in appropriate sizes of population; at the same time, the national races who have states will not receive additional territory of their own in the states or regions of others regardless of how large their concentrations outside of their own states may be.

As for the Tatmadaw, the accepted 104 principles declare that it has the right to independently administer all affairs concerning the armed forces; the Defences Services Commander-in-Chief is the Supreme Commander of all armed forces; and the Tatmadaw has the right to administer for participation of the entire people in State security and defence; the Tatmadaw also has the main responsibility for safeguarding non-disintegration of the Union, of national solidarity, perpetuation of sovereignty. The Tatmadaw is mainly responsible for safeguarding the State constitution.

If one assumes that the new NC completes its work, who will define the work to be done at the second step—implementation of the process necessary for the emergence of a genuine and disciplined democracy? Although Prime Minister Khin Nyunt discussed the concept in his formal speech, the term does not appear in the adopted principles. This, in fact, may be a topic the new National Convention will take up and resolve.

From the Prime Minister's speech, it is not clear whether the elected members to the Pyithu Hluttaw who were chosen by the people in 1990 will be assembled. According to the SLORC Announcement No. 1/90, July 1990, Art. 20, "The representatives elected by the people are responsible for drafting a constitution for the future democratic state." Unless the present rulers intend to violate their own law, the Pyithu Hlattaw should finally be seated. Also, if the military honors its own declaration (1/90) there is no basis for the National Convention to have any role in writing the new constitution. If both the NA and the members of the Pyithu Hluttaw are seated. it could lead to a contest between the two over the validity of the constitutional principles. Since the accepted meaning of the term, Pyithu Hluttaw was defined in the 1974 constitution as the "highest Organ of state power and exercises the sovereign powers of the

Also, if the military honors its own declaration (1/90) there is no basis for the National Convention to have any role in writing the new constitution.

State on behalf of the people," it remains to be seen, whether or not the SPDC will allow the Pyithu Hluttaw to be seated and act freely, without dictation, as implied in the formal term or if it will be required, as a price to be seated, to voluntarily follow the principles drafted by the NC. Or, does the ruling junta intend to cancel the election results, even at this late hour, and give the job of writing the new constitution to the members of the NC?

These are just a few of the questions which must be answered if a constitution emerges which the people will accept and live under in peace.

What Do The Two Events Suggest About The Future?

How do Depayin and the road map relate? Did they occur because the military leaders were divided on the question which has vexed them since Daw Aung San Suu Kyi arrived on the political scene on August 26, 1988—how to get rid of her without arousing the population against the military? Did the military leaders see her growing crowds during her visits outside of Rangoon and their own failure, thus far, to win popular backing as an intolerable situation. Did they reason that unless they got rid of Daw Aung San Suu Kyi they would never be able to make their dictatorship permanent. Depayin offered them a way of solving their problem with her if she had been killed. Anything, they may have reasoned, can happen in a riot; and had the attempt on her life been successful, it would have drawn sharp and loud criticism from abroad and caused great discontent and unrest among the peoples of Burma. But, had she been removed, it would have become an historical fact, just as the assassination of her father became a fact that everyone eventually learned to live with.

Did they reason that unless they got rid of Daw Aung San Suu Kyi they would never be able to make their dictatorship permanent. Depayin offered them a way of solving their problem with her if she had been killed.

Given that no other person has her charisma and hold upon the people, both in and outside of Burma, a leaderless opposition to permanent military rule could, in time, have been manipulated, split and made irrelevant.

Does the road map idea achieve the same end without the need to murder their rival and fear that someone else might rise from the crowd, take her place and assume the leadership in Burma's struggle against military dictatorship? Presumably, the road map was addressed to the people primarily and to the outside world secondarily. It suggested that the military, at last, felt strong enough to push through their constitution and erect a permanent constitutional dictatorship. With or without Daw Aung San Suu Kyi, it may have seemed to the military leaders, who sup-

ported the map, that it could count on the people not to rise up and attempt to challenge their rule and count on a few foreign states to support its move; it also may have discounted the states of Western Europe and the United States as unwilling to repeat the Iraq experience. So long as Burma opened its physical and human resources to foreign investors and gave them financial or other rewards for supporting strong military rule, the military rulers could triumph.

For the supporters of the road map, the elimination of Daw Aung Suu Kyi, was not necessary to successfully complete their plans. They know that her isolation under house arrest is acceptable to the Burmese people and the international community so long as everyone knows or believes that she is not mistreated and is allowed a tiny decree of freedom within the walls of her villa. If, however, the plan to murder her in a riot, or in a situation where her guards were incapable of protecting her from the wrath of her attackers, that might be made acceptable if they could convince the people that they did everything to protect her. And, if they failed, it would be seen by all that it was not the military which murdered her, but an individual or group of individuals who were unknown before the tragic act and they could not be prevented from carrying out their plans. If a proper period of mourning was decreed and she was interred with her father it could respond positively to the Burmese sense of forgiveness that Buddhism teaches, all of its followers might respond peacefully and no hold the military rulers at fault.;.

Time seems to be on the military rulers' side as states both near and far grow impatient to see some sort of political stability return to Burma, some sort of power structure in place which can contain the "radicals" in Burma and create an environment to allow the nation to participate in the great projects of international highways, waterways, dams and power projects being planned in Southeast Asia which depend upon the inclusion of a peaceful and cooperative Burma.

It can be hypothesized that probably most of the members of SPDC favored the Depayin plan, as it was the first to be tried. When its failure was realized, the leaders drew together, said nothing and waited to see what domestic and international action it might have provoked. The people, though angered, were not able to unite and respond forcefully to the men who almost succeeded in murdering Daw Aung San Suu Kyi. The international community quickly spoke up and major industrial nations such as the United States, Japan and the Western European states took some kinds of economic action. But carried on at a distance and with the United States deeply involved in the Middle East, the industrialized states, too, could not unite on what to do and, in the end, each took

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its own action as they reacted independently.

In the face of the negative reaction primarily from Western states, the Burma rulers turned to Asian neighbors and friends to contribute support. Thailand, leaped to Burma's defense and PM Thaksin sought to lead and orchestrate a "Stand by Burma" program. Since Thaksin assumed the office of Thailand's PM, he has moved his nation as close to Burma as possible with the hope of receiving economic benefits for his family's businesses as well as for the nation. China, India and Bangladesh, too, refused to condemn Burma or join the West in any common anti-Burma program. With these and other nations on its side, Burma had nothing to worry about from neighbor states.

In this situation, the Burma leaders were free to rethink the Depayin and other anti-Daw Aung San Suu Kyi actions. The plan to announce a "road map to political change" was an ideal way to shift interest away from the horrors of Depayin and toward Burma as it "turned, yet another page"; this time to solve the long festering political problems by moving the nation toward a "disciplined" democracy. Even though the seven steps are so vague that the map can lead anywhere or nowhere, each nation can fill in the blanks itself and wait to see if its guesses were correct .

In the meantime, the junta reshuffled the seats at the leadership table, giving their system a French look with a Prime Minister to oversee the day to day affairs and shoulder the blame if any emerges and establish a Presidency with real power in his hands of the nation's leader, especially to choose and dismiss his Prime Minister.

As Daw Aung San Suu Kyi awaits the freedom of her fellow leaders and the people await peace, freedom and security from a demanding, violent and predatory government, Burma's wheel of fortune is being readied to be spun once again.

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Endnotes

* Professor Josef Silverstein is an academic from the United States of America. He is a well-known Burma expert with a long history of involvement in the issues of Burma. The Professor witnessed political changes in Burma from democratic regime to dictatorship in 1962, as he was teaching at Mandalay University in central Burma during that period. He has written and edited several books and articles on Burma. His book entitled "Burma: Military Rule and the Politics of Stagnation" (Cornell University Press, 1977) is a well- known text.

Freedom of Expression and Transition away from Authoritarian Rule

*BK Sen**

The article Media Law now named in this article Freedom of Expression is reproduction of the presentation made in media seminar sponsored by (Internews) in 2003. The resource person was esteemed Prof. Fowler. It is published in this journal in the context of serious situation prevailing in Burma. Freedom of Expression is the key step in the ongoing road map. All steps worked out in the road map for transition will be redundant without this first step. "Abrogate the "The Printers and Publishers Registration Act, 1962 [Revolutionary Council Law, No. 26]"

Yesterday Prof. Fowler gave us the topics for discussion in the workshop under seven subtitles. In the morning section, we discussed the international standard and in the afternoon, the Burma lawyers' Council (BLC) Mass Media Law was the focus. In my address to you today I would argue that there are no necessities for a special one media law in the whole range of laws affecting media. The purpose is to provoke a debate in the context of broadest concepts of human rights. My proposition may not be acceptable. However, the debate will bring into surface the principles of free media.

To my mind, the purpose of law is to put restrictions rather than give rights. The rights are usually enshrined in a constitution or bill of rights. Freedom of the media is an enforceable fundamental right. It is not a gift of law but exists independently of it. The law cannot give it. It can either restrict or deny it. Constitutions generally place some reasonable restrictions on its exercise-restrictions, which are well recognized and accepted in all liberal democracies. These restrictions are imposed by general laws applicable to all. My question therefore is why then a Special Law?

I would refer to Prof. Fowler who drew our attention to the first Amendment of the US Constitution. "No law shall abridge Freedom of Expression even if it is offensive." Therefore, I will argue that lets us put the restriction in our basic law, the supreme law of the country, the Constitution and other general laws. Let us not burden our people who are poor with hundred of laws. The less number of laws we have in our country but more awareness of the people is promoted, the more people have knowledge, the more vibrant is our civil societies, the more our political parties give good governance the less number of laws we will need. We may even broaden the definition of the freedom of expression. However, we should not do anything to restrict or limit it under conditions of necessities, or for public order; these are all flexible terms.

Media, which has emerged as the powerful institution in society, has been characterized as the Fourth Estate in many liberal democracies. It has pulled down many governments on grounds of corruption, lack of transparency, lack of accountability, and ruined careers of political leaders and tycoons. It has also its failings, lack of commitment and playing an affirmative role in poverty eradication. It is well to remember that the freedom of the media is not the freedom only of its owners and of journalists. It essentially the freedom of the people to be informed fully and truthfully on all matters of public importance. Media laws and ethics have to aim at securing these objectives. To the extent that they enable, and not obstruct, the media to fulfill this essential function, are adequate and satisfactory. If not, they need to be changed and refurbished. Alternatively, we could not have media laws or ethics at all. The media laws and ethics of this country have to be tested on this anvil. I will try to cover this in its entire essentials against a backdrop of the Burma Legal and ethical scenario.

Historical Perspective of Mass Media Laws

I will break this discussion up in the following order;

(1) Colonial Era
(2) Post Independence (U Nu Era)
(3) Ne Win (Military Era)
(4) Burma Socialist Programme Party Era
(5) State Law and Order Restoration Council's Era
(6) State Peace and Development Council's Era

(1) Colonial Era

As Prof. Fowler explained, common law was the British model. It was

exported to Burma. Burma was conquered in three phases, 1824, 1852 and 1885 when India, a neighboring country was already under British occupation. Most of the laws enforced in India were also enforced in Burma, including Media Laws.

The Press Act 1835 came in. It was seen to be a very liberal law. Then came XV of 1857, which was known as the Gagging Act. It introduced mandatory licensing for the owner or operator of printing presses, empowered the government to prohibit the publication or circulation of any newspaper, book or other printed matter; and banned the publication or dissemination of statements or news stories which had a tendency to cause hatred or contempt for the government, incite disaffection or unlawful resistance to its orders, or weaken its lawful authority. The law expired in 1867 when the Press and Books Act was enacted, which was not very controversial. In 1870 the law of sedition began which prohibited the incitement of, or attempts to incite, disaffection against the government by spoken or written words, or actions. This law was subsequently incorporated in the Penal Code. The Vernacular Press Act of 1878 was a far-reaching measure, which allowed the government to clamp down on the publication of writings, deemed seditious and to impose punitive sanctions on printers and publishers who failed to fall into line. Under this law, any district magistrate or police commissioner could demand security from the printer and publisher of a newspaper, forfeit such security or confiscate any printed matter considered objectionable, without the aggrieved party having recourse to a court of law. This was repealed in 1880 to earn the goodwill amongst the Burmese population. These laws applied to Lower and Central Burma which were under British occupation.

In 1885, with one line, the British declared that Burma was annnexed to India as one of its provinces. There after all laws in India became laws of Burma except the customary law.

Relevant to media law, there was the amendment to the Official Secrets Act of 1899, which expanded the government's powers to prosecute in respect of civil matters as well as military and naval matters. The amendment also made it impossible for those being prosecuted to obtain bail. This was widely perceived as a measure aimed at curtailing the freedom of the press. The Newspaper (Incitement to Offences) Act 1908 was promulgated. It authorized local authorities to take action against the editor of any newspaper that published matter deemed to constitute an incitement to murder or rebellion. The birth of Young Men Buddhist Association (YMBA) in 1906 and its spread in 1910 witnessed a movement as in India articulating nationalist aspiration. People began to adopt a more assertive stance, and asserting freedom of expression. The Indian Press

Act 1910 was enacted. The leading nationalist newspaper *"Myan-mar Alin"* in Burmese appeared in 1920 and New Light of Myanmar in English appeared in 1930. The Indian Press Act was a comprehensive law that aimed to increase government control over the press. Under the Act, owners of presses were required to tender security deposits; these were to be forfeited if they printed any 'objectionable' matter. Further action, including seizure of presses, could be taken if the papers persisted in such conduct. The Act also authorized customs and postal authorities to detain and search mail suspected of containing 'objectionable' matter. In addition, the police were given extensive powers of search and seizure. The harshness of this legislation was matched only by the vigor of its enforcement.

The laws of 1908 and 1910 were abolished and Indian Press (Emergency Powers) Act 1931 was enacted. It combined the worst features of the 1908 and 1910 and 1930 laws. Under Indian Press (Emergency Powers) Act the government could demand a security deposit from any newspaper and forfeit it if the paper published anything which, in the opinion of the government, tended to (i) incite or encourage the commission of any cognizable offence involving violence; or (ii) express, directly or indirectly, approval or admiration of any person who commits or is alleged to commit such offence. Where the paper concerned had not made such a deposit, the government could forfeit the press in which it was being printed. The Act also allowed the postal and customs authorities to seize articles in the course of transmission where it was suspected that they contained matter tending to incite or encourage the commission of a cognizable offence or expressed approval or admiration of any person who was involved in the commission of such an offence.

The nationalist movement continued to grow with the birth of *"Doe Bama Ase Ayong"*, All Burma Students Union (ABSU), Rangoon University Students Union (RUSU) and the advent of the doyen of Burmese literature Thakin Ko Do Maing. The main instrument to suppress freedom of expression was censorship, and an uneasy relationship between the government and press persisted. The *Hanthawaddy* and *Thuria daily* newspapers were under the strict vigilance of the authorities. The Second World War broke out and free press ceased under Japanese occupation.

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On 4 January 1948, Burma's new leaders had to urgently address the role of freedom of speech and expression in the country's emerging constitution. Toward this end, they included an article, that guaranteed freedom of speech and expression (Article 17 (i), read with Article 17 (ii) of the Constitution. The philosophy behind the approach of the constitutional draftsmen is best expressed in the words "I would rather have a completely free press with all the dangers involved in the wrong use of that

freedom, than a suppressed or regulated press."

With this background I would request you all to examine the "Printer and Publisher Registration Law 1962", Your conclusion, I have no doubt, will be that is worse than the colonial press laws I have placed before you. It is the most heavily regulated in the world. I will discuss it later.

(2) Post Independence Era (U Nu Era)

My focus will be that in this era, the first transition to democracy, there was no special media law. A veteran media personality, U Thaung, characterized this era as the "Golden Age of Free Press" in Burma.

When U Nu was Prime Minister, a small department called the Press Review Department read through newspapers and periodicals so that government departments could respond rapidly to what was being said about them in the press. Only on a few occasions, did U Nu attempt to restrict freedom, the Emergency Provision Act 1950 and Public Order Preservation Order (POPA). In late 1961, he suspended the newspaper, *Htoon Daily*, and detained its editor, U Htun Pe. During this period, the famous U Thant who became the Secretary General of UN was in-charge of the Press Review Department. This period being a transitional period, democracy had many deficiencies. No sooner than, U Nu was in power, civil war broke out. The Karen ethnic minority and the Burma Communist Party went into armed rebellion. Some battalions of the Burma Army joined along with Peoples. Volunteer Organisation (PVO). Actually, U Nu government was reduced to Rangoon Administration. Then, the ruling party under went a vertical split. U Sein Win a noted journalist and editor of the *Guardian Daily*, vividly portrayed the political scenario. The country was approaching a near chaos situation. The parliament invited General Ne Win to take control and handed over power. A caretaker government was installed. An election was held in 1960 and U Nu returned to power.

This narrative is given to corroborate my stand that there was no resort to repressive media laws. In spite of the difficulties of the times, it is a tribute to the strength of Burma's democracy that emergency, and security concerns did not succeed in breaching the ramparts of freedom and the rule of law. The country enjoyed all the political freedom traditionally associated with a liberal democracy. The press played its role in safeguarding this right and the right of the courts. The Supreme Court had wide powers, including the power to issue high prerogative traditional writs such as *habeas corpus, mandamus, prohibition and, certiorari*. The right to approach the Supreme Court had itself been made a fundamental right. The

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free press freely published all the gross violations of human rights by the enforcement agencies. It prevented executive intrusion/intervention in the highest judiciary. The point I am laboring to make out it is that in spite of such a critical situation, no law to restrict freedom of expression was put in place. This historical evidence is sufficient to establish my case for no special media law.

From the historical evidence, a collateral issue arises, namely: why did democracy flounder and the military coup over-threw it? From the point of view of media, my humble submission is that despite a free press, the freedom was not properly used. To make matters short: if you go through the newspapers of that period you find they had insufficient coverage of the issue of civil war, on the issue of bankruptcy of political leaders, and the criminal neglect of the rights of the ethnic nationalities. By all standards the paramount issue of that era was the right of secession given to the ethnic nationalities enshrined in article 100 of the 1947 constitution, to be exercised within ten years from the date of coming in of the constitution. General Ne Win seized power on the excuse that the country was disintegrating on this very issue.

My contention is that a media law, by itself, cannot deliver the goods. Freedom of expression, unless it addresses the core issues, which divide the society, and enable authoritarianism to emerge, is a diluted freedom. This media law is not in position to meet the problem; the fundamental law is needed to take care of such evils.

My contention is that a media law, by itself, cannot deliver the goods. Freedom of expression, unless it addresses the core issues, which divide the society, and enable authoritarianism to emerge, is a diluted freedom. In March 1962, Ne Win seized power and in August 1962, his Revolutionary Council promulgated the "Printer and Publisher Registration Law".

(3) Ne Win (Military Era)

In March 1962, Ne Win seized power and in August 1962, his Revolutionary Council promulgated the "Printer and Publisher Registration Law". The Generals did their homework very well and targeted the most vital sectors of human rights. It is said that freedom of expression is first in all fundamental rights, which are equal. The Generals knew that this right was the biggest danger to their continuation in power. So as a masterstroke they promulgated the above law, right at the out-set. The international human rights NGO Article 19, has described this law as the "main instrument of official censorship". Under this law, a Press Scrutiny Board (now called the Literary Works Scrutinizing Committee) was formed by the Ministry of Home affairs. The members of this body are officers from the military intelligence and the police Special Branch.

In September 1964, the Revolutionary Council nationalized the country's newspapers due to their outspoken criticism. This ended Burma's Free Press, a press that had been one of the most free and lively in Asia. Two State-controlled daily newspapers were provided: the *Working Peoples*

Daily (Burmese in 1963 and in 1964 in English. No independence newspaper or magazines existed.

(4) Burma Socialist Prgramme Party Era

The Burma Socialist Programme Party (BSPP) gave a sham constitution to the people, though it made provision for freedom of press. Ironically, the 1975 State Protection Law was passed under which Daw Aung San Suu Kyi was subsequently kept under house arrest. This Provided no right to appeal. It was used with other media laws. The authorities did not repeal "Printer and Publisher Registration Law No. 26/1962". On the contrary, in the 1975 it issued a set of guidelines eleven to the press scrutiny board.

BSPP's Guidelines were repressive and complete censorship. They were more or less copybooks of the one party system that existed before the cold war. In 1985, the Television and Video law was enacted which had a considerable adverse impact on the state of freedom of expression in the media in Burma. It provided for compulsory licensing of television sets, videocassette recorders and satellite television by the Ministry of Communication, Posts and Telegraphs, and of the video business by newly-constituted State or Divisional Video Business Supervisory Committees. There were many other restrictions. These included public exhibition, censorship certificates, and there was no right to appeal to court- appeal was only to the Ministry of Information. The 1985 law laid down a stiff penalty: imprisonment for five years, an unspecified fine or confiscation. Suppression of freedom of expression led to the historic uprising 8-8-88. Freedom of expression came into the open and demonstrated people power under which the BSPP regime collapsed.

(5) State Law and Order Restoration Council's Era

The 8-8-88 events taught the junta some lessons. Immediately the "Printer and Publisher Registration Law" was amended in 1989. The penalties were increased: imprisonment for up to seven years and a fine of up to 30, 000 Kyats.

It was the era when multi-party democracy was proclaimed as the goal of the State. It held a General Election in which Daw Aung San Suu Kyi's party, the National League for Democracy (NLD) won a landslide victory. Instead of handing power according to the mandate of the election, measures that are more repressive followed. Daw Aung San Suu Kyi was kept under house arrest.

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The Computer Science Development Law 1996 bans unlicensed computer networks, and the penalty was 15 years in jail. The motion Picture Law 1996, created a regime of censorship for conventional cinematograph films. A license was mandatory. Punishment was a fine and cancellation of licenses. There was no appeal to court.

(6) State Peace and Development Council's Era

In 1998, a set of regulations (11/98) was passed concerning video. There is only one state run news agency in Burma. This disseminates information to government controlled newspapers, radio and television stations. The state newspapers are published by the News and Periodicals Enterprise, a division of the Information Ministry. The State Peace and Development Council (SPDC) continues to own and control all daily newspapers, domestic radio and television broadcasting facilities. These official media are propaganda organs of the SPDC, and do not report opposing views, except to criticize them. While some state-owned newspapers, continue to include only edited international wire service reports on foreign news, domestic news has complied strictly with SPDC policy.

All privately owned publications, remain under close scrutiny and are subject to pre-publication censorship by state censorship boards. Due to delays in obtaining the approval of the censors, private news periodicals are generally published monthly or less often. Although private weekly tabloids have proliferated, they also remain subject to strict censorship, and do not report on domestic political news.

Imported publications, also remain subject to pre-distribution censorship by state censorship boards. Possession of publications not approved by the state censorship boards, is a serious offence and punished by imprisonment. The SPDC also restricts the legal importation of foreign new periodicals, by licensing. Citizens are unable to subscribe directly to foreign publications. Censors frequently ban issues, or delete articles deemed unwelcome by the SPDC.

Since 1997, the SPDC has issued only a limited number of visas to foreign journalists, and has held only a few press conferences on political subjects. Several journalists, who entered the country as tourists, were detained and deported by the SPDC. Apart from the representatives of China's official Xinhua News Agency, no foreign journalist is allowed to live in Rangoon.

Mainly due to widespread poverty, limited literacy, and poor infrastructure, radio is the most important medium of mass communication. News

periodicals rarely circulate outside urban areas, and most villages lack access to electrical power, except form generators or batteries.

The SPDC continues to monopolize and tightly control the content of all domestic radio broadcasting. Foreign radio broadcasts, such as the British Broadcasting Corporation (BBC), Voice of America (VOA), Radio Free Asia (RFA), and the Norway-based Democratic Voice of Burma (DVB), remain the principal sources of uncensored information in Burma.

The SPDC severely and systematically restricts access to the electronic media. Under a decree issued by the State Law and Order Restoration Council (SLORC) in 1996, all computers, software, and associated telecommunications devices are subject to registration. Possession of unregistered equipment is punishable by imprisonment.

The Ministry of Defense operated the country's only known Internet Service Provider. In 1999, it began to offer internet services, selectively to a small number of customers. The country's first cyber café opened on Rangoon in 1999, but did not offer patrons direct access to the Internet. Since late last year, some 5,000 people within the country have access to the national Intranet, the Burmese junta's substitute for the Internet. Many web surfers have complained about delays in updating websites.

All websites are controlled by Bagan Cyber Tech. Bagan Cyber Tech is an IT company owned by a famous local businessperson with strong ties to the military government. Any publishing company or other business hoping to launch a website must go through Bagan. As such, it acts as a kind of censorship board for online version of magazines and journals, because the Military Intelligence (MI) is watching closely. Under the military regime in Burma, there is no freedom of expression. The Press Security Board, which consists of officers from the army and MI, censors every sentence of periodical journals and magazines both before and after printing.

Media in Exile

Something must be said about the talented journalists who fled the country and setup media in foreign countries. A few of them may be named: *Irrawaddy, New Era, Myanmar Alin, Voice of Burma, Mizzima News Group, BurmaNet, Shan Herald Agency for News, Lighting, Amyin Thit, the Journal of Constitutional Affairs, Legal Issues on Burma Journal, Mon Forum, Chin Journal, Yoma, and Dove.* There are a host of other newspapers and magazines

that champion the cause of restoration of democracy in Burma. Radio broadcast on different issues by RFA, BBC, VOA, and DVB reach people inside Burma.

Following are some examples of the military's crack-down on the freedom of expression:

U Tin Moe, editor of *Pei-hpu-Hlwa*, in 1992 sentenced to four years in prison. He is National Literature Award winner.

U Win Tin former editor of the *Hanthawaddy* newspaper, sentenced to three years imprison. This was subsequently extended to ten years in 1992 and again to 7 years in 1996.

Ma Thida, a medical doctor, short story writer, sentenced to 20 years in 1993.

Hla Min, Htay Win and Thida Aye and a printer Khin Maung Than, of the Thein Than Printing Works were detained.

Dr. Mauna Maung Kyaw (ten years imprisonment) and other (seven years imprisonment) were sentenced to long prison terms for helping Aung Htum with the preparation of his books.

Publication of popular literary journal, *Sa-Pay-Gya-neh*, was censored for its honor to leading poet Min Thu Wun.

The magazine *Thint Pawa* was censored in 1996 for commemorating the 75th university of Rangoon University. It license was canceled for publishing a speech by deputy minister Tin Maung Than who fled to Thailand in 2000.

The NLD, although a registered legal political party, has been denied publication license.

There are many other cases, which cannot be listed for lack of space.

Conclusion

My submission is that the more media laws we have, the greater the tendency to become arbitrarily oppressive. There is a wide body of what may be described as 'general' statutory law, which applies to all mass media alike. The plethora of legislation regulates the operational aspects of life and more than one sector of the mass media. The laws deal with, for example, restrictions that can be imposed on freedom of expression on

grounds of national security and public order, personal reputation, public morals and public policy, personal privacy and contempt of court.

There are several statutes, which impose restrictions on the mass media on grounds of national security and public order. The most prominent of these is the Indian Penal Code 1860. Its provisions are supplemented by the Code of Criminal Procedure 1973. Section 124-(a) deals with sedition and section 153-(a) with enmity between different groups. It covers hate speech in. section 195-(a). Other laws include the Police (Incitement to Disaffection) Act 1922, the Official Secret Act, the Post Office Act (1898), and the Custom Act. Section 292 of the Penal Code deals with public morals and public policy, and section 294-(a) of Penal Code relates to public policy.

The law of defamation has two distinct components, the criminal law of defamation (contained in the Penal Code) and the civil law of defamation (contained in the common law). Section 499 of the Penal Code contains four explanations and ten exceptions to the general rules of defamation. The exceptions offer useful defenses to the mass media against unjust or oppressive attempts at prosecution for defamation. Common law and criminal law guarantees a general right of privacy. For example, nuisance, trespass, harassment, defamation, malicious falsehood and breach of confidence. 'The right to privacy is implicit in the constitutional guarantee of the right to life and liberty, It basically means a right to be left alone'.

The Contempt of Court Act is a restriction on media. Under the Evidence, Act, production of certain documents can be enforced, and confidentially of sources can be maintained. Freedom of expression includes the "right to know" and therefore access to information can be obtained.

It is my submission that media law, of itself, is not essential. What is necessary is a vibrant civil society, democratic political parties, constitutional empowerment of the marginalized, transparency, decision making at the grassroots, and accountabilities. In short-good governance will meet the concerns and rights of the media . The media can have a self-regulated institution like Press Council charged with the tasks of preserving the freedom of Press and maintaining and improving the standards of media and other mandate.

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Endnotes

* The author is an Executive Committee Member of the Burma Lawyers' Council.

Human Rights Norms in Burmese Society

*Khin Maung Win**

Certain human rights norms exist in Burmese society. Human rights violations occurring in Burma would not have happened if there was greater opportunity for these human rights norms to be upheld or practiced. To understand this problem it is necessary to study the source of the norms before considering why the norms haven't been respected. Human rights norms found in Burmese society come from three sources:

- Buddhism and Buddhist literature;
- Common law and Burmese legal traditions; and
- International obligations.

This article looks at each of these sources and concludes that they provide a foundation for informal Bill of Rights that operates in Burma.

Buddhism and Buddhist Literature

A wide range of human rights norms can be found in the teachings of Lord Buddha and Buddhist literature[1]. However, the construction of human rights in Buddhist countries may not be the same as their construction in western societies. This difference should not be interpreted as showing there are no human rights notions in Buddhism and in the societies influenced by Buddhism like Burma. When looked at through the western rights prism, the human rights norms of Buddhism are not so apparent.

Rights and duties in the western approach

Provisions of most of the human rights documents of the western soci-

ety - from Magna Carta (1215) to Universal Declaration of Human Rights (UDHR, 1948) - deal mainly with rights. Given their historical genesis it is clear why these documents have a rights focus: such rights are fundamental for citizens to resist repressive monarchs/regimes. Therefore, one common approach in western societies is that claiming, or belief in, rights strengthens the power of the powerless. This belief can be seen as a reflection of the period surrounding the American and French revolutions of the 18th century that produced such seminal declarations as the American Declaration of Independence (1776) and French Declaration of Rights of Man and Citizens (1789) respectively. These prominent human rights documents claim mainly the rights of the free man, not incorporating any significant duties of those they are seeking to protect.

Western human rights documents, however, do remind us that there are duties that sit alongside rights. The UDHR (particularly articles 29 and 30) and several provisions of other international human rights documents such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) articulate positive and negative duties to be performed by parties concerned. According to Raz, rights are the grounds of duties in the sense that one way of justifying holding a person to be subject to a duty is that this serves the interest on which another's rights is based.[2] But not all documents sufficiently express duties. Nickel expressed frustration with human rights instruments that they do not sufficiently or clearly define who is obliged to ensure the enforcement and implementation of the rights they declare.[3] These statements demonstrate that the generating and performing of duties by the right-holders is part of the construction of human rights also in western societies. What western experience suggests is that there are always duties along with rights.

Duties and rights in Buddhism

As Keown suggests, the lack of words equivalent to "rights" (human rights) in Theravada Buddhism does not necessarily mean that there is no concept of rights in Buddhism. The concept of rights exists in Buddhism even though a word for it does not. Most of the human rights concepts found in Buddhism are of the duty-oriented type. The fact that Buddhism addresses duties, rather than rights, could be misinterpreted in some situations that Buddhism does not promote human rights. In Buddhism what is due in any situation is determined by reference to Dharma.[4] Dharma, as Keown points out, determines not just "what one is due to do" but also "what is due to one".[5] Performance of duty by one is aimed to ensure the rights of another (or others). Through X's performance of

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his or her duty, Y receives enjoyment to which he or she is entitled. The duties of one party correspond to the entitlement or "rights" of another (or others).

Buddha laid down codes of duties to be performed by every individual in six social categories of pairs,[6] according to rank and position in life. These are:

1. Parents-children
2. Teachers-pupils
3. Husband-wife
4. Friend-friend
5. Employer-employee
6. Recluse-devotees

Fulfilment of duties by the one in any of above pairs will ensure the enjoyment of rights by other(s).[7] The relationship of persons in these social pairs may be seen as a patron-client relation. It is typically different from the western human rights concepts in which the rights concept is based on equality of abstract human beings. However, being characterised as a patron-client relationship doesn't necessarily mean that the human rights concept is absent. Each individual fulfilling their duties assures the rights of their counterpart in the social pair. For example, the five duties of parents[8] are to assure the rights of their children.

The classical model of patron-client relationship that generates the rights of clients can be found in "king-citizen" relationship, which Buddha also provided for scripting ten duties for the king. The ten duties of the king are:

1. *Dana* or giving
2. *Sila* or moral integrity
3. *Pariccaga* or philanthropy
4. *Ajjava* or uprightness
5. *Maddava* or gentleness
6. *Tapa* or self-control
7. *Akkodha* or absence of anger
8. *Avihimsa* or non-violence
9. *Khanti* or patience
10. *Avirodhata* or absence of obstruction

It is the duty of king to serve regally in accordance with the standards of these rules. Where the king (or government in modern sense) performs these duties, such performance automatically leads to the enjoyment of rights by the citizens. In many cases, government in a Buddhist country

often fails to perform the duties. It is obvious that the ongoing human rights violations in Burma happen in direct contradiction with, or ignorance of, the ten duties that the rulers have to perform as a government (king).

What Buddha suggested is that individuals, whatever social category they are in, are responsible to perform their duties in order to make sure others can enjoy rights. If one neglects his or her duties, he or she neglects his or her responsibility, which will result in the gradual disappearance of peace and harmony in society. It can be seen then that Buddha approached human rights from the perspective of duties. The performance of duties by each and every individual will automatically afford them their rights. Its essence is reciprocity which is a key feature of many societies and relationships.

Buddhism and universal human rights

Phra Dhammapitaka underlines the commonalities between Universal Declaration of Human Rights and Buddhism as follows.

> As for Buddhists, we can certainly see in the UDHR the likenesses that are inherently similar to Buddhist practice. Comparing the UDHR to the Five Precepts,[9] we will see that the Five Precepts serve as principle social pillars. If human beings act in accordance with Five Precepts, then there is no need for the UDHR; however the UDHR was needed precisely because of its universality. Buddhism that contains in essence these Five Precepts, like other religions, is not universally practised. The combination of the Five Precepts and the Six Directions (sometimes referred to as Six Social Categories as above) are then to be found with the UDHR and its acceptance into Burmese society is in a sense a reflection of the wider practices of Buddhism. The UDHR, in this regard, supports the principles of the Lord Buddha's teachings by:
>
> 1. Translating the teaching into precise standards to give effect to the practice of the Five Precepts[10] in real life, with control mechanisms so that the Five Precepts yield concrete results;
> 2. Introducing greater detail for practice, for example, the First Precept (on abstaining from taking life or doing bodily harm) or the Second Precept (on abstaining from taking what is not given) as modified into 4-5 standards and to suit with time.[11]

Phra Dhammapitaka continues:

> Comparing with Buddhism, the provisions contained in the UDHR have similar nature with Five Precepts and Six Directions. What the UDHR illustrates is that the Five Precepts or Six Directions are not sufficient to give direct guidance. The UDHR being more particular gives guidance. They serve as minimum requirements or social standards which, at least, protect the world from setting on fire, enabling people to live together and develop life to even a higher plane. In doing so, we need to go beyond the Five Precepts and the Six Directions, we need to develop ourselves further through the Sila, Samadhi, Panna.[12]

Negative and positive duties

Some western scholars, like Henry Shue, have divided rights into positive and negative rights, corresponding to the division of rights into social, economic, and cultural rights as positive rights and civil and political rights as negative rights. Positive rights require positive duties or to act in such an order that these rights will be realized; while negative rights require negative duties or not to act in a way that will harm the rights of others. Further, three correlative duties - duties to avoid depriving, duties to protect from deprivation and duties to aid the deprived - are provided by Shue for the realization of rights.[13]

Buddha's teaching of duties also incorporates this negative-positive paradigm. The negative duties in the Five Precepts are directed at what behaviour to avoid in order to not harm the rights of others. On the other hand, five positive duties to act with - kindness, renunciation, contentment, truthfulness and mindfulness - are suggested.[14] Buddha encouraged the accumulation of individual property only by striving hard and in righteous ways in order to fulfil one's own requirements and to perform many duties.[15] According to Buddha's teaching, one who is wealthy has duties to aid others in need. This duty, according to Shue, is a duty to aid the deprived.

Preventive action

The history of the human rights movements has many examples demonstrating that the calls for protections of human rights mostly occur when such rights are violated or seriously threatened. In such environments, the human rights movement has proved that actions taken after violations are always a step behind the promotion and protection of human rights.

Therefore, many scholars have called for preventative actions rather than reactive actions in order to fully realize human rights. Scholars like Phillip Alston and international institutions including the United Nations have proposed more effective preventive measures.[16] A point of interest is that traditional human rights notions found in the teachings of Lord Buddha are all about preventative measures that can effectively promote and protect human rights. If they are practised with due diligence in Burmese society, then such violations or threats would be avoided.

Justiciable rights

For rights to be recognized as human rights to be upheld or protected in a legal setting, they must be triggered with a "claim". To enforce a right is to do so by staking a claim against someone who has either violated it or not upheld it. To have a claim is to have a case meriting consideration, that is, to have reasons or grounds that put one in a position to engage in claiming.[17] For Martin, human rights are claims plus something else - namely, the appropriate form of social recognition. According to Martin a human right claim which lacks such social recognition is still a claim, and may even be a morally valid one, but it cannot qualify as a human right.[18] After gaining social recognition, a right so claimed shifts to a legitimising process. It means a right in question is examined by the concerned parties, government in particular, and integrated into domestic legal provisions for enforcement. Enforceable rights are also known as justiciable rights.

Human rights norms found in Buddhism and Buddha teachings are more than claims. Some of the norms are found as legal provisions in Burmese laws capable of legal enforcement. For example, actions such as killing and harming others, sexual misconduct and stealing or destroying one's property are not only prohibited in the Five Precepts, but also feature in Burma's criminal law. A Burmese legal expert pointed out that Burmese Buddhist Customary Law provides better protection of the rights of women, than similar laws in societies of neighbouring countries like in India and Pakistan.[19] Of course, where there are found to be discriminations based on gender, simply being not as bad as neighbours does not make them good laws, however the comparison is useful for argument. Therefore, human rights notions found in Buddhism and Buddha teachings are more than merely claims as they have won social recognition and some have been integrated into domestic laws. In other words, human rights norms found in Buddha teachings either have been transformed into justiciable right or have strong ground to become justiciable rights.

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Common Law and Burmese Legal Traditions

Common law and human rights

In England and many of its former colonies, the practices of promotion and protection of human rights come from a common law tradition. The Magna Carta of 1215, the Petition of Right of 1628 and the Bill of Rights of 1689 are seminal human rights instruments in forming the common law system. The unwritten constitution of England puts emphasis on the virtue of the common law and the legislative supremacy of the parliament. It relies on the political process to secure that parliament does not override the basic rights and liberties of the individual, nor remove from the courts the adjudication of disputes between the citizens and the state arising out of the exercise of public power thus preserving judicial review a key precept of protection for the individual.[20]

One commentator explained the common law's role in improving human rights:

> "[The] common law has protected or can protect civil and political rights in various ways. First, the common law has, for a long time, recognized and protected various rights and freedoms which it has seen as fundamental. Secondly, the common law, responding to the avalanche of legislation which regulates our conduct, has developed rules of statutory construction which reduce the degree of legislative encroachment on those rights and freedoms. Furthermore, the common law system includes foremost human rights notions and standards that later came into practice not only in Britain, but almost all of the countries and societies which follow the common law tradition".[21]

Legal principles that are fundamental to the protection of human rights are embodied in at least five writs widely practices in the common law system. They are summarised as follows.[22]

1. **Habeas Corpus** - A prerogative writ used to challenge the validity of a person's detention, either in official custody or in private hands. Deriving from the royal prerogative and therefore originally obtained by petitioning the state. If, on an application for the writ, the court is satisfied that the detention is prima facie unlawful, the custodian is ordered to appear and justify it, failing which release is ordered. In addition to being used to test the legality of detention, the writ may be used to obtain review of (1) the regularity of extradition process, (2) the right to or amount of bail, or (3) the jurisdiction of a court that has imposed a criminal

sentence.

2. **Mandamus** - A prerogative order from the court instructing an inferior tribunal, public official, corporation, etc., to perform a specified public duty relating to their responsibilities. One example would be to implement the result of the a lawful election conducted by the state.[23]

3. **Certiorari-** A remedy in which the High Court orders decisions of inferior courts, tribunals, and administrative authorities to be brought before it and quashes them if they are ultra vires or show an error of law on the face of the record. Since the remedy exists for the public good the applicant need not show a direct personal interest, but he must apply for it within three months and it is always discretionary. Originally a prerogative writ, it is now obtained by an application for judicial review.

4. **Prohibition**- A remedy in which the High Court orders an ecclesiastical or inferior court, tribunal, or administrative authority not to carry out an ultra vires act. One example may be where the lower body is hearing a case or doing something, outside its jurisdiction. Prohibition is available in cases in which, had the act been carried out, the remedy would have been certiorari and it is governed by broadly similar rules.

5. **Quo Warranto -** The writ of Quo Warranto is an application to examine matters related to the appointment or election of a certain person to determine under which authority he or she is acting. It is a procedure to protect an infringement of a citizen's rights by the correction of an abuse of power by a state authority.

Burmese legal system

Burmese legal system was the most developed in Southeast Asia in the pre-colonial period. The lively Burmese legal culture was at its height between 1752 and 1819, under the first five kings of Konbaung dynasty (Third Burman Empire).[24] The legal system at that time was mostly derived from the *dhammasat*.[25] Dhammasats were rulings/decisions of the Burmese courts during monarchical rule before the British took over Burma. The Burmese legal culture was gradually supplanted when the British took final control over Burma in 1885. Nevertheless, dhammasats still constitute important part of today's Buddhist customary law in Burma.

Modern Burmese law is derived from the common law tradition of this period of British colonial rule. Despite the fact that totalitarian and authoritarian regimes introduced several repressive laws, the basic common law legal foundation remains strong.[26] In addition to the British common law tradition, the Burmese legal system constitutes three strands-customary law, statutory law and judicial decision making.[27] Burma's Penal Code, the Criminal Procedure Code and some other laws that are directly or indirectly dealing with the rights of defendants and the citizens were given birth during the British colonial rule.[28]

Some of the common law traditions become distorted under the military rule. Habeas Corpus, for example, was first included in Burma's 1947 constitution. However this was expunged by General Ne Win's military regime, which formally ruled Burma from 1962-1988, to deny the rights of his political opponents.[29] If most of the common law traditions that existed or are existing in Burmese legal system are upheld, some violations especially violations against political activists would not have happened or would, at least, be provided with an effective remedy.

Constitutional provisions

Independent Burma has had two constitutions - the 1947 constitution and the 1974 constitution.[30] The rights and freedoms guaranteed under "Fundamental Rights" in the 1947 constitution included several civil and political rights; among others freedom of expression and opinion, peaceful assembly, the right to form associations and unions, freedom of conscience, the right to choose and practice religion, several anti-discrimination provisions and constitutional remedies for these rights and freedoms if violated.[31] The chapters "Relations of the State to Peasants and Workers" and "Directive Principles of State Policy" deal with economic, social and cultural rights.[32]

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The 1974 constitution provided a long list of economic, social and culture rights[33] and limited civil and political rights which include peaceful assembly and the right to recall elected representatives.[34] The provisions that outline specific human rights can be found in the following articles.

- *Article 2 (Brotherhood amongst the ethnic groups)*- The Socialist Republic of the Union of Burma is a State where in various national races make homes together.
- *Article 8 (Peaceful-coexistence)*- There shall be no exploitation of man by man nor one national race by another in the State.

- *Article 10 (The rights of child; economic, social and cultural rights)-* State shall cultivate and promote the all-round physical, intellectual and moral development of youth.
- *Article 21 (The rights of minority, state responsibility)- (*A) The State shall be responsible for the constantly developing and promoting unity, mutual assistance, amity and mutual respect among the national races. (B) The national races shall enjoy the freedom to profess their religion, use and develop their languages, literature and culture, follow their cherished tradition and customs, provided that the enjoyment of any such freedom does not offend the laws or the public interest.
- *Article 22 (equality; economic, social and cultural rights)-* All citizens shall: (A) be equal before the law, regardless of race, religion, status, or sex; (B) enjoy equal opportunity; (C) enjoy the benefits derived from his labour in proportion to his contribution in manual or mental labour; (D) have the right to inherit according to law.
- *Article 23 (civil right)-* No penal law shall have retrospective effect.
- *Article 24 (respect for dignity)-* Punishment shall not be awarded in violation of human dignity.
- *Article 42 (political right) -* The *Pyithut Hluttaw* (People's Assembly) shall be formed with People's representatives elected directly by the secret ballot by citizens who have the right to vote under this constitution and other electoral laws.
- *Article 102 (cultural rights, respect for ethnic languages)-* The Burmese language shall be used in the administration of justice. Languages of the national races concerned may also be used, when necessary, and arrangements shall then be made to make interpreters available.

Spirit of the human rights provisions

There is no constitution in operation in Burma currently. However, the constitutional principles discussed above suggest the following two points.

- Burma's constitutional principles are widely adapted from the human rights principles articulated in the UDHR, as well as in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Although the implementation is very weak, the reality is that

Burma's constitutional principles generally follow international customary law in terms of rights and freedoms.

Abolition of the constitution by the military regime in 1988 was due to political reasons to pave the way for the army to take over state power. Experiences of other countries, as well as in Burma, tell us that constitutions are more than bills of rights. Constitutions provide the political system and administrative structure of the government organs. The abolition or amendment of an existing constitution comes when the need arises to change the political system and administrative structure. Constitutional change should not be with the intention of destroying the rights and freedoms embedded in the constitution. When a new or amended constitution is approved, more or less the same set of rights and freedoms are included, because most countries draw rights and freedoms from the UDHR and other international human rights instruments. This should also be the case for Burma when a new constitution is drafted.

Looking at these two points, it can be said that the spirit of constitutional principles dealing with human rights inculcated in Burmese society are alive, even though there is no constitution in operation.

Although some legal principles sometimes lay dormant, the legal foundation of the common law is still in operation. This system underpins the Criminal Procedure Code and other laws protecting human rights such as those to be found in the Burmese Buddhist Customary Law. Rights protected in these laws can be enforced through the existing judicial mechanisms. Attempts by the National League for Democracy and other political activists to remedy the violation of their rights such as breaches of criminal law and the Political Parties Registration Act, through the judicial mechanism demonstrates that Burmese citizens know how rights can be protected and remedied.[35] The lack of success of these proceedings is simply due to an absence of rule of law and due legal process.

International Obligations

Obligations under the conventions

Most obvious international obligations come from the human rights instruments to which Burma is a state party. They are listed in the following table.

The lists of major international instruments to which Burma is a party

No	name of instrument	date of accession/signature/ratification
1.	Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[36]	accession on 22 July 1997
2.	Convention on the Political Rights of Women	signature- 14 September 1954
3.	Convention on the Rights of the Child (CRC)	accession- 15 July 1991
4.	Convention on the Prevention and Punishment of the Crime of Genocide	ratification- 14 March 1956
5.	Geneva Conventions (but not to protocols)	ratification- 25 August 1992
6.	ILO Convention 29 on Forced Labour	ratification- 4 March 1955
7.	ILO Convention 87 on Freedom of Association and Protection of the Right to Organize	ratification- 4 March 1955

These treaties show that Burma has obligations under international law in terms of promotion and protection of human rights.

Obligations under international customary law

Some human rights, obligations in international law are found in some general legal norms recognized by nations that are often referred to as international customary law. Unlike treaties which contain more prescriptive catalogues, customary law is now confined to the protection of a fundamental and nucleus of human rights. All states are in agreement that the commission of gross human rights violations are contrary to general international law, indeed, to international *jus congens,* and therefore all states have an obligation to prohibit them from happening.[37] Burma as a nation has also accepted international customary law, in an implied manner similar to other states. The constitutional provisions (referred to above) and other domestic laws, such as Criminal Procedure Code and Evidence Act, reflect international customary law. The fact that many of UDHR provisions have been integrated into Burma's domestic laws including its constitutions, demonstrates that Burma cannot deny its acceptance of UDHR as international customary law.

Signing/ratifying of, or accession to, international human rights instruments by the successive Burmese governments means that the government promises its people and the international community that it will respect and protect rights in these instruments. Citizens do not need to claim the rights that are embedded in those international instruments, in order to make those rights justiciable. It is then the responsibility of the government under international law to integrate those rights into domestic law. There have been attempts by the military regime, where laws are promulgated from the rights contained in international instruments, to integrate them into their domestic jurisdiction. For example, the Child Law was promulgated following the accession to the Convention on the Rights of the Child (CRC). However, not all international instruments to which Burma is a member are treated the same way CRC was treated. The failure by the government to integrate human rights instruments into domestic legal system should not be an excuse used to deny the enjoyment of these rights by the citizens.

Conclusion

Questions arise about how systematic human rights violations can occur, despite the presence of such strong human rights norms. Having human rights norms and laws embedding them, however, does not automatically give protection to human rights. Violations are not due to a lack of human rights norms, nor an absence of laws embedding them. There are two main causes for rights not being protected and the systemic and well documented widespread violations occurring: an unwillingness of the government to implement human rights, and the lack of rule of and due process of law to enforce those rights.

The degree of protection and promotion of human rights in a country depends on the willingness of the government to implement them. The unwillingness of the military government to implement human rights is based on their desire to control all 'politics' in Burma.

The degree of protection and promotion of human rights in a country depends on the willingness of the government to implement them. The unwillingness of the military government to implement human rights is based on their desire to control all 'politics' in Burma. Serious violations in Burma are the product of the military's strategy to respond to opposition political movements. Until government accepts that a peaceful opposition movement is legitimate and part of any democracy, the government's willingness to violate, not to protect, the human rights will remain unchanged.

Lack of rule of law and due process of law is also a major contributing factor for the violations. UN Special Rapporteurs on Human Rights in Burma have repeatedly pointed out the lack of rule of law and due proc-

ess of law in Burma.[38] Among obvious examples of military government abuse of power outside due process of law include ignorance of electoral law that the military government itself promulgated; removing professional judges gradually since 1962; and recruiting underage boys to the army[39] despite the Child Law protecting the rights of the child. Military authorities, especially military intelligence officers, are not only behind, but cause all politically motivated trials. Court decisions about sentencing (including the length of sentence and which prison) are, in all cases, decisions of the military intelligence officers who are known as the brains of the military government.

Despite not having a Bill of Rights incorporated into a single written legal text, it should not be thought that there is no foundation for a Bill of Rights in any particular society. This is equally true for Burma. Burma has an informal Bill of Rights drawn from Buddha's teaching, the legal foundation deriving in essence from the common law system, and the constitutional provisions and international obligations. In other words, human rights norms in Burmese society have collectively laid a solid foundation for a Bill of Rights which is reasonably good enough to promote and protect human rights, if they are upheld.

Endnotes

* The author is an Executive Committee Member of the Burma Lawyers' Council.

1. Burmese Buddhism is Theravada. This is one of two principle branches of Buddhism and it is also widely practiced in Thailand, Laos, and Sri Lanka. The other branch is known as Mahayana Buddhism which is widely practiced in China, Taiwan, Korea, Japan, Tibet and Central Asia. Some Burmese scholars regard Burmese Buddhism as Customary Buddhism, which is different from two other kinds- Nevanic Buddhism and Magical Buddhism. Human rights norms are mostly found in Customary Buddhism (Dr. Aung Khin March 2004).
2. See Joseph Raz, "On the Nature of Rights", in Morton E. Winston (ed.), in Philosophy of Human Rights (Belmont, California: Wadsworth Publishing Company, 1989), p. 57.
3. James W. Nickel, "How Human Rights Generate Duties to Protect and Provide", in Human Rights Quarterly, No. 15, Johns Hopkins University Press, 1993.
4. See Damien Keown, Are There Human Rights in Buddhism?, article is available online at http//www.urbandharma.org/udharma/humanrights.html (September 2002)
5. Ibid
6. Some Buddhist scholars like Venerable Phra Dhammapitaka, a well known Thai scholar and the recipient of 1994 UNESCO Prize for Peace Education, regard these social categories as "Six Directions".
7. For further explanation about duties of each individual, see Ven. Dr. Gallelle Sumanasiri, Buddhism and Confucianism (Colombo: Karunarantne & Son Ltd., 1998), pp. 67-71.
8. Five duties of parents are (1) to restrain them (children) from vice, (2) to exhort them from virtue, (3) to train them for a profession, (4) to contract suitable marriage for

them, to hand over their inheritance in due time. For more detailed explanation about different types of duties of different types of individuals including duties of parents, see Ven. Pategama Gnanarama Ph.D., An Approach to Buddhist Social Philosophy (Singapore: TI-SARANA Buddhist Association, 1996), pp. 29-32.

9. Five Precepts serve as foundation for all Buddhists in daily social relations with each other. The first precept is to avoid killing or harming living beings. The second is to avoid stealing, the third is to avoid sexual misconduct, the fourth is to avoid lying and the fifth is to avoid alcohol and other intoxicating drinks.
10. One starts by recognizing bad behaviour and striving to stop doing it. That is what the Five Precepts are for. After stops doing bad, one starts to do good. For more explanation about Five Precepts, see online information center on Buddhism "Buddhanet" at http://www.buddhanet.net/ans88.htm (September 2002)
11. Venerable Phra Dhammapitaka, "Human Rights: Social Harmony or Social Disintegration", a booklet published by the Ministry of Foreign Affairs, Thailand to commemorate the Fifty Anniversary of the Universal Declaration of Human Rights, Bangkok 1998, pp. 13-14.
12. Ibid, p. 14.
13. Further explanation about positive and negative rights, See Henry Shue, "Basic Rights", in Robert E. Good in and Philip Pettit (eds.), Contemporary Political Philosophy, (Blackwell, 1998), pp.341-252; and in Morton Winston (ed.), The Philosophy of Human Rights (Belmont, California: Wadsworth Publishing Company, 1989), pp. 152-171.
14. See Ven. Dr. Gallelle Sumanasiri, Buddhism and Confucianism (Colombo: Karunarantne & Son Ltd., 1998), pp. 58-61.
15. Buddha denounced unrighteous five means of livelihood, which include trade in weapons, trade in animals, trade in meat, trade in liquor and trade in poison.
16. See Philip Alston, "The UN's Human Rights Record: From San Francisco to Vienna and Beyond", Human Rights Quarterly, 16 (1994), pp. 375-390.
17. For more detail information on claim and human rights, see Joel Feinberg, "The Nature and Value of Rights", in Morton E. Winston (ed.), Philosophy of Human Rights (Belmont, California: Wadsworth Publishing Company, 1989), pp. 61-74.
18. Ibid, see introductory note, p. 13, and pp. 75-85.
19. Interview with B.K Sen, 12 October 2001.
20. A.W. Bradley, "Constitutional and Administrative Law", Tenth Edition (low-price edition), English Language Book Society/Longman, (England: Longman House, 1988), pp. 584-5.
21. See John Doyle and Belinda Wells, "How Far Can the Common Law Go Towards Protecting Human Rights?", in Philip Alston (ed.), Protecting Human Rights Through Bill of Rights: Comparative Perspectives (Oxford University Press, 1999), pp. 18-19.
22. The definitions are excerpted from Oxford Dictionary of Law (CD Rom 1994 Version, Oxford University Press) and the Black Law Dictionary, Seventh Edition (West Group, St. Paul and Minn., 1999). Further explanation can be found in Edward Lawson, Encyclopedia of Human Rights, Second Edition (Taylor & Francis, 1996).
23. National League for Democracy in late 1999 and early 2000 filed with the Supreme Court on the ground that the ruling military junta and the Election Commission failed to implement the result of a lawful election. The court, however, rejected the claim.
24. Konbaung dynasty came to an end when British occupation completed in 1885.
25. Also spell as Dhammattha meaning just and righteous.
26. For some background information on Burmese legal system after 1962, see Myint Zan, "Law and Legal Culture: Constitutions and Constitutionalism in Burma", in Alice Tay (ed.), East Asia: Nation-Building, Human Rights, Trade, (1999), pp. 200-01.
27. For additional information about Burmese legal system, see B.K Sen, "Women and Law in Burma", Legal Issues on Burma Journal, No. 9, (Bangkok: Burma Lawyers' Council, August 2001), pp. 28-43.
28. Interview with B.K. Sen, 12 October 2001.
29. Interview with B.K. Sen, 12 October 2001.
30. The 1947 constitution was in operation during 1948 to 1962. The 1974 constitution was in operation during 1974 to 1988. There have been two periods without operating

constitution in Burma- 1962-1974 and 1988 up to now. Ruling State Peace and Development Council has been trying to draw up a constitution since 1993, but the process met with strong opposition from the democracy movement led by Daw Aung San Suu Kyi.

31. See chapter 2, the 1947 constitution.
32. See chapter 3 and 4 of the 1974 constitution.
33. See chapter 11 of the 1974 constitution.
34. Article 15 of the 1974 constitution.
35. For more information on the NLD's legal actions demanding remedies, see Khin Maung Win, "NLD Again Hits Junta with Legal Action", The Nation, September 3, 2000. See also Burma Lawyers. Council, Legal Issues on Burma Journal, No. 3, May 1999, pp. 37-39.
36. Reservations -The Government of Myanmar does not consider itself bound by the provision set forth in the said article - article 29
37. For more details about implementation of international obligations along with international customary law, see Benedetto Conforti, "National Courts and the International Law of Human Rights", in Benedetto Conforti and Francesco Francioni (eds.), Enforcing International Human Rights in Domestic Courts (The Hague: Martinus Jijhoff Publishers, 1997), pp. 3-14.
38. For more information on lack of rule and law and due process of law in Burma, see Burma Lawyers' Council, "An Urgent Need for Judicial Reform in Burma", in Legal Issues on Burma Journal, Bangkok; No. 3, May 1999, pp 45-47.
39. A report released by Human Rights Watch in October 2002 indicates Burma as a country with largest number of child soldiers, as many as 70,000, in the government army.

Impunity and Judicial Independence

*John Southalan**

Impunity means the impossibility of bringing the perpetrators of human rights violations to account... Impunity arises from a failure by States to meet their obligations to investigate violations...[and a failure] in respect of the perpetrators...[to] ensure that they are prosecuted, tried and duly punished [1]

United Nations Special Rapporteur

Impunity…[is] one of the most serious human rights problems and a fundamental reason why human rights violations continue to be committed [2]

United Nations Working Group on Arbitrary Detention

The last few years have seen some encouraging developments against impunity in the Asian region. Indonesia's first democratically elected government for decades is addressing violations committed by the previous President Suharto[3] and military commanders.[4] In Israel, a military court convicted an army officer over the death of teenager - the first time a soldier has been convicted over the death of a Palestinian since the start of the current intifada.[5] Cambodia, while still suffering many problems, seems to be moving ahead with the recent agreement for an international tribunal to investigate previous abuses.[6] A Special Panel for Serious Crimes has been established in East Timor.[7] The new Malaysian Prime Minister has directed moves against corruption in the country - a government minister and other senior government officials are now standing trial on charges of embezzling state funds.[8]

What do these examples mean? Are these and other international devel-

opments - such as the 1998 arrest of Chile's ex-President on torture charges,[9] and the development of the International Criminal Court[10]- just isolated incidents? Or is there a trend toward increasing observance of the rule of law? More relevantly, what significance do they have for Burma and what use can be made of international developments in addressing the situation in Burma? This article attempts to answer these questions in the following five parts:

(1) causes of impunity;
(2) combating impunity;
(3) judicial independence;
(4) Burma - impunity and judicial independence; and
(5) conclusions

The article's conclusion, in reaffirming the importance of an independent judicial system, is nothing new. However, it is hoped that through undertaking this analysis with detailed reference to impunity issues, this article collates materials that assists in demonstrating the importance of an independent judiciary in Burma.

(1) Cause of Impunity

The following discussion uses examples from countries other than Burma. This does not indicate that these countries have flawed legal systems under which impunity reigns supreme. It should not be encouragement to the military regime in Burma that there needn't be concern about the situation in Burma - as later discussion shows, the Burmese problems are very serious indeed. The use of other country examples is indicative more of the greater openness and accountability in those nations, which makes access to information easier.

Impunity can be encouraged and assisted by a nation's laws or the policies and practices that operate in the country. However it is also important to be aware of international factors that contribute to impunity.

1.1 Impunity through national laws

In this section, the article covers laws protecting perpetrators from prosecution. The most obvious example is where a country's constitution or constitutional system prevents the standard treatment of an offender, such as prohibiting legal action to be taken against certain officials in any circumstances. Another impunity assisted through constitutions, though,

is where the parliament or executive are permitted to vary or ignore basic rights 'guaranteed' in the constitution.[11]

One factor that can assist or encourage impunity is the country's approach to constitutional change. Where a constitution is not viewed as the fundamental law and can be easily amended, it is far more likely the government of the day may engage in practices contrary to the rule of law and encouraging of impunity. This was taken to ridiculous extremes in one European country where the country's courts ruled a certain law unconstitutional so the next day the parliament amended the Constitution to make it comply with the previously unconstitutional law.[12] There have also been concerns expressed about the lack of permanence in the constitutions of some Asian countries:

> *In Sri Lanka, three decades witnessed three constitutions, each drafted by a different government. Successive Indian government in three decades of existence amended the constitution 50 times. Clearly, the sense of a constitution as 'fundamental law' has yet to emerge* [13]

Governments or parliaments often create situations of impunity by making laws giving to police or government officials, wide-ranging powers of detention far exceeding those available under general law.[14] Perhaps one of the more contentious, and difficult to solve, areas of legal impunity is where a law is specifically passed to protect a person or class of persons from action. This often arises in the use of amnesties and the procedures of truth commissions. Arguably, amnesties have a role where a responsible government may be faced with a situation that a power group will gain unconstitutional control if the government does not grant amnesty. However, following misuse in the United States of America, many amnesties have been adopted inappropriately.[15]

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Although this article discusses truth commissions under 'causes of impunity', it acknowledges the very commendable work performed by some commissions. Some bodies have been able to address past violations, give over-due and proper recognition to victims, and to assist transition to a less-troubled future for a country. However, inasmuch as many Commissions operate under a departure from the standard 'rule of law' procedure, they need to be analysed to determine possible contributions to impunity. There are voices of criticism. One UN Special Rapporteur explained that establishing such commissions sometimes allows government to evade properly dealing with a problem.[16] Of even greater concern, however, is the analysis of the 'benefits' derived from many truth commissions. An experienced international lawyer examined the various commissions established in Latin America and concluded that the emergence of truth doesn't of itself produce reconciliation, instead, revelation

of violations that go unchecked make reconciliation less likely.[17]

1.2 Impunity through national practises / policies

Where a law creates impunity, it can theoretically be fixed by repealing it or passing another law to remedy the situation. The problem is more serious, however, when governmental or societal practice creates the impunity these practices are not so easily changed. Economic and cultural factors can contribute to impunity by restricting people from exercising their rights. Even where the laws' wording may provide adequate protection, the situation in practice may be very different.

Many factors influence how laws are used in practice, which can create impunity for groups in society. One factor present in all countries is the economic divide and often laws operate to favour only a few.[18] Another influence contributing to impunity is where a society is highly stratified, with certain groups or classes enjoying greater merit and privileges. This makes it more likely members of that class will not be treated equally before the law, particularly where those involved in law enforcement (police, court staff etc) may be from a 'lower' class to the accused. Impunity was encouraged in Indonesia, for example, through the military's historical dominance that pervaded into all parts of society.[19] Another commentator suggests religious attitudes must be examined for their contribution to impunity. [20]

Where a legal situation operates for a long time it can become part of the culture or practice. For example, a provision that begins as a simple legal or structural change (eg. implementing a national security law) can develop a practice of impunity through changing attitudes and approaches.[21] This is an important reason why laws creating impunity must be promptly addressed.

Another societal influence that can create impunity is a lack of diversity in the judiciary. Judges are often perceived as supporting (perhaps unconsciously) the status quo and traditional views. Issues such as violations of women's rights, indigenous land rights and other matters have gone unchecked for decades in many countries where the judiciary fails to adequately understand and therefore protect these matters. Problems lie not only with the judiciary, though, for the contributions to impunity by lawyers and prosecutors is a matter that has received attention in some Asian countries. [22]

In many ways, although societal practices are less obvious in causing impunity than legal structure, they are more powerful. For instance, even

Economic and cultural factors can contribute to impunity by restricting people from exercising their rights. Even where the laws' wording may provide adequate protection, the situation in practice may be very different.

where a legal system contains many guarantees of rights and protections against impunity, if the practise is that these protections are not observed, this causes impunity.[23] Equally disturbing is where the laws or governmental system have been changed but old practices remain that contribute to impunity. This is seen to have happened in some former Eastern European countries[24] and also in Cambodia. A long term lack of rule of law can contribute to societal acceptance of impunity:

> *Cambodia was a nation with no traditions of sharing power and no institutions with which to limit it: one either had absolute power to use and abuse, or was subject to those who did. Nor does Cambodian history provide any examples of governments peacefully giving up power: the violence with which opponents were traditionally treated, taken to gross extremes under Pol Pot, perhaps suggests why. Power - and only power - brought security, as it also did wealth and patronage* [25]

1.3 Impunity at the international level

There is a great deal of real-politick in the international system: an acceptance of, and preparedness to deal with, influential groups or persons ruling a country regardless of the legality or background of their rule. The notion that the more powerful and repressive one gets, the less likely one will be answerable to law, is reflected up in a depressing saying from the former Yugoslavia:

> *When someone kills a man, he is put in prison. When someone kills 20 people, he is declared mentally insane. But when someone kills 200,000 thousand people, he is invited to Geneva for peace negotiations* [26]

This acceptance of violators (provided they are powerful enough!) has the effect of encouraging impunity for those violators. By virtue of the violator's power and abuse inside their country, they will not be 'answerable' to its legal system, and if the international system does not sanction these violators, then there will be no check at all. This problem has been particularly apparent in the situation of Cambodia: various countries that are currently advocating action against the Khmer Rouge, were only a few years back supporting the same regime.[27]

Many influential voices in the international system argue that departure from the rule of law is sometimes necessary in resolving conflict.[28] The idea that solving difficult conflicts often involves impunity and cannot be done without impunity, is explicitly accepted and advocated, not only by the violators approaching the end of their rule, but also by various gov-

ernments,[29] and also reportedly by officials from the United Nations ('**UN**').[30] This acceptance and encouragement of impunity can have a serious effect on people within a country:

> *impunity…remains a major obstacle in the rehabilitation of victims… particularly where such impunity creates the impression that the community in which the victim lives condones the violations* [31]

Possibly the greatest ally of impunity at the international level is the influence and actions of governments as they seek to further their interests. It should come as no surprise, therefore, that many human rights matters that requiring urgent international attention, are left unaddressed because of other governmental 'interests' such as defence, trade, or simply 'if I say this about them, they might say the same thing about me'.

The arrest of Chile's ex-leader, General Pinochet, in the United Kingdom ('**UK**') on torture charges [32] was widely celebrated by human rights defenders, with some even suggesting the UK and Spanish governments should be congratulated. [33] Closer analysis, however, reveals both governments sought exemptions for Pinochet to avoid the standard legal process. The Spanish government opposed the Spanish judge's request for Pinochet to be extradited to Spain to face trial. [34] The UK government departed from the usual procedure, under which Pinochet should have been extradited to Spain, to order that Pinochet be released. [35] In a more recent case involving universal jurisdiction, proceedings in a Senegalese Court against Chad's former ruler for torture charges, the court hearing was terminated amidst allegations of interference by the Senegalese government.[36] Government interests may be a large reason for the lack of greater use of universal jurisdiction. [37]

International law has historically, and to a large degree remains, concerned only with the actions of States. The propriety, or otherwise, of individuals' actions is left to national governments. [38] Many governments have, over the years, progressed from the infallibility of their leadership and actions, to somewhat greater accountability. International organisations have been formed to try and assist development of international standards, but while organisations such as the UN remain with a decision-making system controlled by governments, it is likely the decisions and actions will largely be in favour of governments. However, in the international sphere, there still remains strong support for the inviolability of the sovereign state. State sovereignty, and the continuance of an international system that doesn't have any potential to interfere with this, is openly supported by some. For example, many parliamentarians from the United States of America ('**US**') supported a proposed law against the

International Criminal Court ('**ICC**'). This measure was taken largely because the ICC is able act against the direction of the US government.[39]

The US also works to weaken the UN, which is perceived as a threat to US domination, by withholding large debts it owed to the UN.[40] The crippling of the UN's ability, and reducing the effectiveness of other international organisations, leaves powerful States 'running the show'. This was openly acknowledged by the Chair of the US Parliament's Subcommittee on International Operations, who advocated against the US respecting any future ICC ruling:

> *A decision by the International Criminal Court to prosecute Americans [*namely US citizens*] for military action would not be the first time that an international court tried to undercut our pursuit of our national security interests. In 1984, the World Court ordered the U.S. to respect Nicaragua's borders and to halt the mining of its harbours by the CIA. In 1986, the World Court found our country guilty of violations of international law through its support of the Contras and ordered the payment of reparation to Nicaragua. Needless to say, we ignored both these rulings.*[41]

The domination of the international order by western and ex-colonial governments creates impunity. These countries prevent effective international attention to historical and continuing violations of vulnerable people and countries. A UN report in 1997 provided a thorough analysis of this situation.[42] The report practices such as colonisation,[43] pillage of cultural heritage,[44] debt,[45] and embargoes.[46] The report identified the problems:

> *For centuries, the colonial Powers, which are easily identifiable today, pillaged the wealth of the colonised countries to the profit of and on behalf of their nationals and to ensure their own economic and social development… At the same time as dominated peoples and countries were being abominably exploited, their cultural heritages were being looted* [47]

The domination of the international order by western and ex-colonial governments creates impunity. These countries prevent effective international attention to historical and continuing violations of vulnerable people and countries.

the report identified ways to approach the problems:

> *To be complete and effective, the campaign against impunity must be preceded by a serious and thorough investigation to bring to light the factual source of the violations and identify the perpetrators and the victims so that the forum can be punished and the damage done to the latter can be appropriately remedied* [48]

and also highlighted obstacles to addressing international impunity:

> *implementation [of economic, social and cultural rights]…necessitates a cer-*

> *tain level of economic development and material support… [S]everal developing countries…had not reckoned with the developed countries determination to undermine any possible basis for a truly fair world economic order where economic, social and cultural rights would have a chance of being realized.*[49]

However, after the report was transmitted to the UN Commission on Human Rights, little effective action has been taken. No doubt one reason for the lack of effective action on this matter is exactly because of the problem identified: the international system is highly inequitable in favour of a few affluent countries.

The effect of all this is to create a global impunity for international matters: breaches of international law by powerful states go unchecked, and the continuing inequities and exploitation of developing countries fails to be properly addressed. These effects are also felt at the individual level. While the UN has developed some useful standards against impunity, there are concerns about its lack of action.[50]

Various international developments have addressed impunity in some respects, which have been commended, including the Nuremburg and Tokyo Tribunals following the Second World War,[51] the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the new ICC. These developments are improvements on what went before, but even these institutions are influenced by state interests and reflective of an order dominated by a few powerful nations. The Nuremburg and Tokyo Tribunals investigated only the actions of the defeated armies and governments,[52] and during the Nuremburg trials the accused were denied various rights and several accused were executed. The current international criminal tribunals are limited in terms of the areas they consider and the crimes they investigate.[53] A helpful way to understand the problems caused by the limited jurisdiction of such tribunals was explained by an international lawyer:

> *It's like saying we'll have a court that deals with murder that's committed in Melbourne on Saturday and Sunday between 9 and 5. It's limited in its jurisdiction in terms of its geographical location and it's limited in terms of the time. It's not a satisfactory system to have that.* [54]

During drafting of the ICC's statutes various provisions were diluted in an effort to attract US support. However this just left the Court weakened in its ability to tackle impunity and promote international justice.[55] One reason for government resistance to the ICC is that action can now be taken directly against military and government decision makers rather than soldiers and civilians.[56] Accordingly, these military and government

decision-makers have been resisting these developments.

Government domination and obstruction affect not only international efforts, but regional developments endeavouring to improve human rights.[57] The problem seen by many is that, in light of the inadequate national system, without an ICC or other international system, violations can only at best be exposed, but remain unpunished.[58]

(2) Combatting Impunity

The above section explained some of the factors that cause or contribute to impunity. Now, the article outlines what is being done in response to impunity. The international community has given attention to addressing impunity, with consideration of the problem particularly prominent since the early 1990's. Although the following division may be somewhat arbitrary, to enable a structured presentation of international materials addressing impunity, this article divides these materials into three categories: (1) United Nations, (2) universal jurisdiction, and (3) other international developments.

2.1 United Nations action against impunity

Various UN bodies and officials have addressed the problems of impunity and how these problems can be combated.

The UN General Assembly and Commission on Human Rights (a subsidiary organ of the UN General Assembly that deals specifically with human rights issues) have passed many resolutions against impunity. Some of these resolutions deal exclusively with impunity[59] and contain admonitions urging 'States to intensify their efforts to provide victims of human rights violations with a fair and equitable process through which…violations can be investigated and made public and to encourage victims to participate in such a process',[60] and calling on States to join the ICC Statute and support the Court's development.[61] However, many other resolutions address impunity in the context of specific violations, such as the resolution on unlawful executions that reminds countries of their obligations to properly investigate such incidents.[62] Another example is the Commission on Human Rights special session on East Timor, which resolved that:

> *all persons who commit or authorise violations of human rights…are individually responsible and accountable for these violations and…the interna-*

tional community will exert every effort to ensure that those responsible are brought straight to justice [63]

UN bodies like the Commission on Human Rights sometimes establish a Special Rapporteur or other mechanism (such as a working group or independent expert) to address specific human rights issues or countries. These officials or groups provide regular reports and many of these reports discuss problems of impunity. Examples of reports that discuss impunity include those from the Special Rapporteur on Torture,[64] Working Group on Arbitrary Detention,[65] Working Group on Involuntary Disappearances,[66] or the Secretary-General's Special Rapporteur on Human Rights Defenders.[67] These reports highlight the problems of impunity and often proceed to make recommendations for how to restrict impunity. One example is the Special Rapporteur on Torture, who emphasised to the UN General Assembly that 'breaking through the shield of impunity' can be assisted to States: (i) ensuring incommunicado detention is prohibited beyond 48 hours; (ii) ratifying the ICC treaty; and (iii) ensuring they have legislation enabling them to take action against perpetrators of human rights crimes.[68] Another Special Rapporteur explained why, even where a government limits punishment against certain persons, the government must still bring those person to justice and make them formally accountable.[69]

The above two matters (annual resolutions and creating special mechanisms) may be criticised as only temporary or 'knee-jerk' responses in addressing impunity. Certainly, the repetitive resolutions describing problems and calling for solutions passed in the UN every year suggest the situation is not improving and question the very effectiveness of such resolutions. However, the UN has also been instrumental in developing international standards against impunity. All the main international human rights treaties are based on declarations passed as resolutions of the UN General Assembly and the declarations and their resultant treaties contain many provisions combating impunity. Some commentators consider the Universal Declaration of Human Rights ('**UDHR**')[70] as the 'authoritative interpretation' of the 'human rights and fundamental freedoms' which the UN members agree to observe in accepting the UN Charter.[71] The UDHR states that every person is entitled to equal protection of the law,[72] and that no-one shall be arbitrarily detained.[73] Some of the UDHR's provisions were the basis leading to the *International Covenant on Civil and Political Rights* ('**ICCPR**') [74] which also contains material about impunity.

[B]reaking through the shield of impunity can be assisted by States: (1) ensuring incommunicado detention is prohibited beyond 48 hours; (2) ratifying the ICC treaty; and (3) ensuring they have legislation enabling them to take action against perpetrators of human rights crimes.

In addition to these declarations and UN-drafted treaties, there are also other standards that specifically address impunity, which the UN has passed or is in the process of developing. Relevant developments are

noted below.

(a) The *Principles of International Cooperation Against Persons Guilty of Serious Crimes*[75] were adopted by the UN General Assembly adopted in 1973. The principles confirm that war crimes and crimes against humanity must be investigated, suspects tried and, where found guilty, punished.[76] The principles require States to cooperate in collecting evidence and information on persons suspected of committing these crimes[77] and to not take any measures that would interfere with the international obligations in relation to accused persons.[78]

(b) The UN's Sub-Commission on the Promotion and Protection of Human Rights conducted a several-year study on impunity. At the conclusion of the study, two reports were presented to the Commission on Human Rights. One report dealt with impunity for violations of Economic, Social and Cultural Rights,[79] which was noted in section 1.3(a) above. The second report addressed impunity in the context of violations of Civil and Political Rights, and provided a set of principles to combat this impunity.[80] These principles have since been noted by the Commission on Human Rights, which invited comments from governments and non-government organisations on the principles.[81] The principles can be grouped into four categories:
   (i) victim's right to know (addressing matters such as commissions of inquiry - series of principles regarding independence, protection of witnesses and information, and publicity of findings; preservation of protected information);
   (ii) victim's right to justice (right to a fair & effective remedy, treaties should include universal jurisdiction clauses, legislative or legal system changes to areas which assist impunity);
   (iii) victim's right to reparations (must have effective remedy); and
   (iv) guarantees for non-reoccurrence (repeal emergency laws, removal of violators from public offices etc.)

(c) The UN's International Law Commission, a body reporting on international law to the UN General Assembly, has produced various texts relevant to impunity. The International Law Commission was instrumental in the developments toward the ICC, which is an important institution in combating impunity. In 1996, the International Law Commission prepared a Draft Code of Crimes[82] and recommended the General Assembly

work toward the widest acceptance of the draft Code. The draft Code contains various principles drawn from international law, many of which have since been incorporated into the statute of the future ICC, to combat impunity. These include an 'extradite or prosecute' provision specifying that states must either prosecute or extradite to a country that will prosecute, anyone alleged to have committed genocide, crimes against humanity or war crimes.[83]

(d) The UN's establishment of temporary international criminal tribunals, with independent judges and prosecutors, provide an important development. The decisions and procedures of these tribunals help to strengthen the provisions of basic human rights standards. The Rwanda tribunal now has in custody (either awaiting trial or already sentenced) the former Prime Minister of Rwanda, several former senior Rwandan Government cabinet ministers, former military commanders, political leaders, journalists and senior businessmen.[84] Decisions of the International tribunals also assist in opposing sovereignty and strengthening international legal principles to address crimes wherever they occur and whoever commits them.[85]

(f) The *Principles of Justice for Victims*[86] were adopted by the UN General Assembly in 1985. These principles recommend that States should regularly 'review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power'.[87]

(g) The UN also focuses on other areas that are often associated with impunity. Two examples are the standards addressing problems of corruption[88] and the use of force by law enforcement officials.[89]

(h) In March 1999, the UN General Assembly adopted the *Declaration on Human Rights Defenders.*[90] The Declaration affirms everyone's right to promote human rights, and specifically reinforces protections for human rights defenders that governments must observe such as right to assembly, promote human rights, participation in government. The Declaration also addresses impunity[91] by stating that where human rights violations occur they must be redressed; requiring states to promptly and properly investigate alleged violations; reiterating the role of an independent, impartial and competent judiciary, and competent legal ad-

vice. The Declaration also notes people's rights to complain about actions of government officials that violate human rights.

(i) In 1993, all the world's governments agreed on the *Vienna Declaration and Program of Action*.[92] This document calls on states to repeal laws that lead to impunity for people responsible for grave human rights violations, and to prosecute those people.[93]

Reports prepared by senior UN officials, such as the High Commissioner for Human Rights, and representatives of the Secretary General, also contain material useful in combating impunity. The Commissioner's report to the 2001 General Assembly noted governments are not doing enough to decrease human rights violations, and supported developments such as the ICC and increased use of universal jurisdiction.[94] The Secretary General's Special Representative on Human Rights Defenders has also spoken against impunity. In her report to the 2001 General Assembly, the Representatives reaffirmed the need for effective remedies for human rights violations, and for states to investigate and punish offenders.[95] In particular the Representative criticised the lack of transparency and accountability in the functioning of State institutions as adding to the culture of impunity.[96] The current UN Secretary-General has spoken against the granting of amnesty to those who commit serious violations of international criminal law such as genocide, war crimes and crimes against humanity.[97] This is repeated by senior UN officials as essential guidelines for UN members,[98] thereby forming useful reinforcement.

2.2 Universal jurisdiction

Universal jurisdiction is a concept that, for certain crimes, allows the accused to be prosecuted in any country, regardless of where the violation occurred. Universal jurisdiction provides a way for a suspect to be brought to trial even where they are immune from prosecution in their usual country of residence.

Universal jurisdiction is a concept that, for certain crimes, allows the accused to be prosecuted in any country, regardless of where the violation occurred. This is contrary to the usual rule, observed in most countries, that a court can only hear cases where the alleged crime happened in the same country as the court, or was conducted by a national of that country.[99] A famous recent example of universal jurisdiction was the 1988 detention of Chile's ex-President to face charges in Spain,[100] but universal jurisdiction has been used a long time before then.[101] Universal jurisdiction provides a way for a suspect to be brought to trial even where they are immune from prosecution in their usual country of residence.

Universal jurisdiction only applies to the most serious crimes in international law including genocide, torture, slavery, crimes against humanity, and war crimes.[102] The doctrine of universal jurisdiction has been applied in court decisions and recognised in parliamentary legislation in many countries.[103] It is also strengthened by inclusion in various treaty regimes

such as the conventions against genocide,[104] torture,[105] hijacking and terrorism,[106] and war crimes.[107] The scope for universal jurisdiction is demonstrated in the way it is viewed by some involved human rights organisations:

> *It is…now widely recognized that under international customary law… states may exercise universal jurisdiction over persons suspected of genocide, crimes against humanity, war crimes, extra-judicial executions, enforced disappearances and torture… It is also increasingly recognized that states not only have the power to exercise universal jurisdiction over these crimes, but also that they have the duty to do so or to extradite suspects to states willing to exercise jurisdiction*[108]

There has been at least one instance of universal jurisdiction assisting efforts for justice in Asia: the late Philippines President Marcos was prosecuted in Hawaii. The decision of the United States' courts denied Marcos was entitled to immunity for torture, kidnap and murder and awarded judgment in favour of the victims, who were compensated from assets in the President's Swiss bank account.[109]

There are obstacles to universal jurisdiction, because of political influence or interference, which were noted in section 1.3 above. However, a few of the other problems with universal jurisdiction should be recognised so that a balanced assessment can be made of the usefulness of such an option. Two of these problems are noted below.

(a) Nearly all universal jurisdiction cases have related to actions of persons associated with Nazi Germany during the Second World War. This limited use of universal jurisdiction weakens the understanding this is some 'universal' principle of protect all victims.

(b) A recent study on universal jurisdiction identified a difficulty of universal jurisdiction in determining what acts are 'crimes against humanity' and 'war crimes', which are subject to universal jurisdiction.[110] This will now be easier through the treaty for the ICC, which defines both these crimes.[111] Other problems with universal jurisdiction, noted in this study, included:

- lack of domestic recognition of international crimes;[112]
- protections given under domestic law (eg. immunity, extradition restrictions);[113] and
- the effect of delay and distance in hindering case preparation because of matters like evidence, investigations, docu-

ments, information, witnesses. [114]

This assessment shouldn't, however, leave the impression that universal jurisdiction is of no use. The arrest of Pinochet, and his having to face court in relation to past violations in Chile during his rule, has had considerable implications. The UK events influenced the situation in Chile, where Pinochet was subsequently stripped of immunity and new legal proceedings were brought in relation to violations occurring under his rule.[115] Subsequent to his arrest, the Chilean Government attempted, for the first time, to establish a reconciliation process between the military and victims. The government also proposed comprehensive reforms of the judiciary to improve its autonomy and to demonstrate Pinochet should be returned to face trial in Chile. But the Pinochet developments weren't only restricted to his homeland. In Argentina, various cases that had been closed with guilty individuals granted amnesty. The Pinochet case led to an Argentine judge re-opening investigations in various disappearance cases and requesting arrest/extradition of various military officers.[116] Even people far removed from crimes against humanity are concerned about the threat of international justice following the Pinochet developments.[117]

2.3 Other international developments / materials on impunity

As noted above, the ICCPR contains some basic principles that oppose impunity. The ICCPR requires those countries that have joined the treaty to 'investigate all human rights violations, particularly those affecting the physical integrity of the victim; to purge and try those responsible; to pay adequate compensation to the victims or their dependants; and to prevent the recurrence of such violations'.[118] Additionally, the ICCPR's provisions in relation to fair trial require that persons facing trial must have access to legal advice and representation.[119]

Another area in which the UN was instrumental in the development, but where the eventual mechanism will operate independently from the UN, is the established International Criminal Court. The Court was established in July 2002. Unlike the previous tribunals, the new International Criminal Court is a body that can consider and rule on the most serious crimes, regardless of where these occurred.[120] The Court will assist in various situations, including where countries are unable to properly prosecute individuals because of insufficient through resources.[121]

Other measures being taken against impunity at a regional level. In the Americas, for instance, a regional treaty and human rights structure has made commendable moves against impunity: the American Convention

on Human Rights has a general clause requiring countries to respect human rights and ensure people can exercise these.[122] When the Inter-American Court of Human Rights considered the Convention's requirements in relation to one case brought before it, the Court's decision was critical of government inactivity. The Court explained that where a country joins a treaty in which it agrees to respect human rights and ensure people can exercise their human rights, then the country's government must have a system where people can protect and enforce their rights.[123] Additionally, the Court explained, that government also has an obligation to act against impunity:

> *The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.*[124]

(3) Judicial Independence

The sections above highlighted some causes of impunity and some of the international developments aimed at addressing these causes. While it is useful to be familiar with relevant international developments against impunity, they must be put in context. Perhaps the most important context is that it is the system and protections within each country that have the greatest role in important factor in improving human rights, and in this particular context, addressing impunity:

> *Human rights violations occur within a state principally in relations between a government and its own citizens, rather than on the high seas or… outside the jurisdiction of any one state. Ultimately, effective protection must come from within the state*[125]

This paramount importance of national protections is even more apparent if one considers that obtaining 'support' for rights within a country is always dependent on international politics and other factors influencing governments and the UN (see further, the discussion at 1.3 above).

In shifting focus from the international system to a domestic system, it should be first noted that the judiciary is commonly recognised and confirmed as the basic structure for protecting human rights within a country.[126] An effective judiciary is seen as one of the ways of addressing impunity.[127] This is logical because an effective judiciary is central to the rule of law[128] and the rule of law is, in many ways, the opposite of impu-

[W]here a country joins a treaty in which it agrees to respect human rights and ensure people can exercise their human rights, then the country's government must have a system where people can protect and enforce their rights.

nity:

> *In a democratic State under the rule of law...even those who hold public office are bound by law and justice. All citizens are equal before the law, and everyone may fight for [their] rights, even against those who are politically powerful, and even against the opposition of political bodies*[129]
>
> *The rule of law must be a rule of the judiciary…the essence of the rule of law [is] that the Government should be controlled by the courts*[130]

The remainder of this article focuses on judicial independence as a method of combating impunity.

The importance of judicial independence has long been recognised by the international community. It is a concept under-pinning some of the basic international human rights treaties.[131] There are various international standards on judicial independence emanating from the UN and other bodies, and since 1994 the UN has appointed an official to investigate and report on judicial independence in countries. This UN official, the Special Rapporteur on the Independence of Judges and Lawyers, believes that the key to progress on strengthening judicial independence is increased awareness of the relevant international standards[132] and so this article now turns to consider what those standards are.

The UDHR identifies the need for an independent judiciary. The UDHR explains that every person has the right to an effective remedy when their basic legal rights are violated,[133] and that anyone charged with an offence is entitled to a fair and public hearing by an independent and impartial tribunal.[134] These rights are further defined in the ICCPR. The ICCPR does not legally bind non-state parties (i.e. those nations which have not ratified the ICCPR, which include Burma) but does represent agreed international standards.[135] The ICCPR's provisions regarding judicial independence, mainly contained in article 14, are centred around the concept that in legal proceedings, 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'.[136] This provision is understood as requiring, and emphasising the importance of, statutory or constitutional protection for judicial independence.[137] Importantly, the ICCPR standards apply to all courts and tribunals in its scope, both a country's normal courts and any specialised bodies set up to try political or military cases.[138]

In addition to the basic human rights standards in the UDHR and ICCPR, there are also other international materials relevant to the issue of judicial independence. These materials and relevant developments are

noted in sections 3.1 and 3.2 (dealing with UN and non-UN materials, respectively). Section 3.3 notes examples of how judicial independence has assisted in combating impunity in various Asia-Pacific countries.

3.1 United Nations standards on judicial independence

The UN has created, or is in the process of creating, various international standards and authorities emphasising the importance of judicial independence. These UN materials and developments include the following matters.

(a) In 1985, the UN General Assembly endorsed *Basic Principles on Judicial Independence*.[139] These principles commence with an important and central provision:

> *The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*[140]

This provision, and other articles in the Basic Principles oblige governments and all power groups in a country not to interfere in the judicial process, or to act improperly in the selection[141] or removal[142] of judges. However, importantly, the principles also emphasise the obligations on judges themselves to act independently: in deciding cases impartially,[143] resisting moves against independence[144] and conducting themselves in a manner preserving their independence.[145] Many countries have formally adopted the Basic Principles and report to the UN on their application within the country.[146]

(b) The 1985 *Basic Principles of Justice for Victims*[147] require governments to ensure judicial mechanisms enable victims to obtain redress through procedures that are 'expeditious, fair, inexpensive and accessible'.[148]

(c) The UN mechanisms are currently drafting *Basic Principles on Reparation for Victims*,[149] which emphasise that States must ensure 'that adequate legal or other appropriate remedies are available to any person claiming that [their]…rights have been violated'.[150]

(d) The UN's temporary international criminal tribunals were noted in section 2.1(d) above. The decisions and procedures of the Tribunals further develop and strengthen the provisions and application of basic human rights standards and judicial independence. For example,

one of the early decisions of the Tribunal for the Former Yugoslavia considered the ICCPR phrase 'tribunal established by law'. The Tribunal explained that 'the guarantee is intended to ensure that the administration of justice is not a matter of executive discretion, but is regulated by laws made by the legislature'.[151] The Tribunal went on to clarify:

> *'Established by law'...[requires that a tribunal's] establishment must be in accordance with the rule of law... [T]o be established according to the rule of law...[a court] must be established in accordance with the proper international standards; it must provide all the guarantees of fairness, justice and even-handedness, in full conformity with internationally recognized human rights instrument*[152]

(e) The International Law Commission's draft Code on International Crimes, which was discussed above (section 2.1(c)), also addresses judicial independence. Relevantly, the draft Code considers judicial guarantees as necessary and as required by international standards:

> *Notwithstanding the diversity of procedural and evidentiary rules that govern judicial proceedings in various jurisdictions, every court or tribunal must comply with a minimum standard of due process to ensure the proper administration of justice and respect for the fundamental rights of the accused.*[153]

The draft Code emphasises the importance of judicial process, and specifies various elements seen as necessary minimum judicial guarantees for these serious cases, which includes the right to a hearing by 'a competent, independent and impartial tribunal duly established by law'.[154] The draft Code is considered to represent customary international law. [155]

(f) Independent judiciary is not just something to be addressed in the abstract, but is repeatedly referred to in the context of protecting other human rights. For example, in the Human Rights Committee's general comments on the right to life, the Committee confirmed that any proceedings involving the potential of death penalty must be heard by an independent tribunal.[156]

The effectiveness of an independent judiciary will be limited if the other elements in the justice system (such as police investigators, defence lawyers, government prosecutors) are not operating properly. This is particularly so in common-law countries (i.e. those derived from an English legal system) where criminal prosecution is undertaken the administration.

The impunity generated by improper practices of lawyers and prosecutors was noted above (section 1.2). The UN has also addressed these concerns.

(g) The Basic Principles on the Role of Lawyers[157] emphasise the necessity of governments to ensure that citizens have easy access to independent legal advice and representation, particularly when detained by government officers.

(h) The Guidelines on the Role of Prosecutors[158] notes that prosecutors must properly investigate and conduct their functions impartially and without discrimination.[159] This includes prosecuting government officials where appropriate.[160]

In addition to formulating standards and principles, UN officials also assist in working with countries to strengthen judicial independence. The most obvious example in Asia is the UN's work in Cambodia, where the UN Office of the High Commissioner opened offices in 1993. The UN reports that a main focus of the Cambodia office's activities is strengthening the judicial system within the country. [161]

3.2 Non-UN standards and authorities on judicial independence

There are various international statements and principles about judicial independence that have been developed outside the UN (eg. through the International Bar Association, judges' association, or through non-government activity). Certainly, careful study can reveal distinctions between the various sets of principles[162] but for the purpose of this article, which focuses simply on relevance of judicial independence to impunity, there is little difference between the various guidelines. All the main international standards and principles on judicial independence call for the courts to be independent from government and recommend how this can be protected.

One set of principles, however, warrants closer attention because they have been signed and accepted by Burma's Chief Justice. These are the 1995 Beijing Principles on Judiciary,[163] which were adopted by the Conference of Chief Justices of Asia and Pacific. In signing the statement of principles in 1995, Burma's Chief Justice agreed with the statement, 'It is the conclusion of the Chief Justice…that these [principles] represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary'.[164]

What is the significance of the Beijing Principles that Burma's Chief Jus-

In signing the 1995 Beijing Principles on Judiciary, Burma's Chief Justice agreed with the statement, 'It is the conclusion of the Chief Justice...that these [principles] represent the minimum standards necessary to be observed in order to maintain the independence and effective functioning of the judiciary'.

tice endorsed? The principles were not drafted hurriedly, but developed through a lengthy process leading to their adoption. They derive from an initial 1982 statement of the principles of judicial independence in the Asian region, followed by a 1991 decision to develop principles expressing minimum standards for judicial independence, to which the Chief Justices of Asia-Pacific countries could subscribe.[165] Drafts and improvements on the principles occurred throughout meetings in early 1990's, making their adoption in 1995 the culmination of a 13-year drafting process involving judges from many countries throughout Asia. Important matters from the Beijing Principles are outlined below.

(a) The principles demonstrate the relevance of ICCPR article 14 (discussed in 2.1 above) by referring to the right under article 14 for everyone to be entitled to a hearing by a competent, independent and impartial tribunal established by law. The Beijing principles emphasise this requires an independent judiciary.[166]

(b) The principles require that judiciary deal with cases before them without improper influence from any source.[167]

(c) The principles also note that the judiciary must have 'jurisdiction, directly or by way of review, over all issues of a justiciable nature'.[168]

(d) The principles acknowledge that judicial independence must be guaranteed by the State through relevant constitutional or statutory protection.[169]

(e) The principles require that 'Judges shall uphold the integrity and independence of the Judiciary by avoiding impropriety and the appearance of impropriety in all their activities'.[170] This places onus on judges to act appropriately and to protect their independence. The principles specify that judges are entitled to freedom of association[171] and to form associations and act to protect their independence.[172]

Other non-UN developments on judicial independence include a 1995 international conference on impunity. The conference considered the issue of judicial independence and heard the importance of information collection in assisting the judicial process and addressing impunity:

> *[N]o judicial process would be possible without credible and reliable information, systematically collected while events were going on. Ultimately, such information enables us not only to bring violators to justice and build a*

> *picture of past violations to satisfy our right to know the truth, but also assist us in the search for strategies, to prevent new violations in the future*[173]

This demonstrates that effective judicial independence requires more than simply some laws protecting judicial decision making. As noted in section 3.1(g) and (h), there are other factors that are necessary to assist a properly functioning judiciary in a country, such as effective prosecutors and lawyers. Information collection and preservation is important, which can be assisted by NGO activity.

3.3 Examples of judicial independence at the national level

There are many examples throughout Asia where an independent judiciary has helped protect human rights within their country. It is useful to consider a few of these examples to appreciate the necessity of an independent judiciary.

The Indian constitution has many guarantees of basic rights. This situation, combined with an independent judiciary that has often ruled in protecting these rights, has been commended by various human rights defenders.[174] Even more importantly, it has been noted the Constitutional protections in India have remained even where the country in undergoing difficult times (in war or during wide-spread political divisions).[175] Bangladesh and Sri Lanka are other examples where the courts have been vigilant in ensuring the constitutional rights of citizens are protected, with numerous court orders that illegally-detained persons must be released.[176]

[T]he Constitutional protections in India have remained even where the country in undergoing difficult times (in war or during wide-spread political divisions). Bangladesh and Sri Lanka are other examples where the courts have been vigilant in ensuring the constitutional rights of citizens are protected, with numerous court orders that illegally-detained persons must be released.

Demonstration of the necessity for judicial independence is also found in New Zealand where, in the last few years, proceedings were brought against the government's security agency for its illegal actions. An initial government enquiry ruled there had been no illegality by the Security Agency.[177] New Zealand's highest court found otherwise, explaining the agency had broken the law in conducting what it considered its 'work'.[178] One judge dismissed a government claim that part of the proceedings could not be heard by the Court because they involved matters of national security. The judge's observations in this regard are a good example of judicial independence:

> *[I]f a case comes before the Courts where it is claimed on what appear to be reasonable grounds that the intelligence organisation has misused its powers, it is to be expected that the Courts will be astute to ensure that the misuse of power is not cloaked by claims of national security… [S]ecret organisations of this kind from time to time misuse their powers in relation to individuals*

and institutions…[and therefore] it is essential that the judicial process be exerted…firmly, to keep the organisations and the officers within the law[179]

(4) Impunity and Judicial Independence in Burma

As a preliminary point, readers should note the following analysis is based largely on documents of the military regime in Burma. This is not because of any concern with the considerable non-government and UN materials highlighting problems in Burma. Rather, the preference for Burmese military sources has been adopted to:

- endeavour to show that, even on the most favourable 'view' of matters (i.e. the situation alleged by the military), there are still problems in Burma; and
- avoid the military's standard response to discussion of the situation in Burma - that the analysis comprises 'baseless allegations made by a few dissidents…[and doesn't use] information from authoritative government sources'.[180]

In section 4.1, the article describes some of the legal aspects in Burma relevant to judicial independence and impunity. In section 4.2, the article discusses what things could assist in strengthening judicial independence in Burma. Before turning to these points, however, it is useful to have a brief understanding of the national context in which particular laws operate in Burma.

Burma gained independence in late 1947 and a national constitution was enacted at that time. In 1962, the military staged a coup and ordered that the 1947 Constitution was no longer operative.[181] The military regime governed the country for many years, introducing a new constitution in 1974 that enforced a one-party socialist system under a military-supported political party. However, the military overthrew this form of government in 1988 and again announced there was no constitution.[182] Despite organising elections in 1990, the military then ignored their own laws by not observing the results[183] and have prohibited the elected members from forming the national parliament. The military is organising a drafting process for a new constitution, which is only allowed to proceed on the basis the military have at least 25% of the country's members of parliament, and remain in political leadership.[184]

The current manner in which the military regime 'governs' Burma does not accord with the rule of law. Three aspects of this are noted below.

(a) The military have explicitly stated there is no separation of powers:

> *The SLORC [*State Law and Order Restoration Council - the name by which the military used to refer to itself*], being a military government, is one that is governing with martial law. Accordingly, it is using the following three powers in governing Myanmar:*
>
> A. *Legislative Power. Only the SLORC has the right of legislative power.*
>
> B. *Administrative Power. The SLORC has the right to administer, but that power has been delegated to the government and states and divisions...law and order restoration councils at different levels...*
>
> C. *Judicial Power. Only the SLORC has judicial power. However, various levels of courts have been formed to handle ordinary criminal and civil cases in order to prepare them for a time when the constitution emerges.*[185]

It is interesting to note the military's 'division' of powers. Even if one were minded to agree that there are circumstances in which a military should temporarily control a country, the relevant 'branch' of governmental power through which emergency powers should operate is the administrative because that is the 'branch' through which executive government acts. The courts and parliament are a guide for, and a 'check' on, any executive action. The military, however, specifically states that the parliament and courts are its sole responsibility, thus removing any independent control over its executive actions.

(b) Following on from this arrangement, and because of it, there is no constitution for the country: 'laws' are passed by military order. However, the military is wildly inconsistent in this approach. Sometimes the military states there is no constitution because it has abolished them.[186] At other times, though, the regime explains that the orders it passes are 'not created' by it, but are required by earlier constitutions.[187] The regime also sometimes breaks its own rules (such as not observing election laws[188]).

(c) The military's inconsistency is not only confined to *how* it rules, but also *why* it rules. At times, the military explains it is simply endeavouring to protect the country from violent elements and to restore stability,[189] and is not interested in politics or ruling the country.[190] These statements, however, conflict with the military's other statements that stability has been restored (thereby suggesting, if the military followed its own reasoning, that its work has been completed) or there is no conflict in Burma.[191] The professed non-

interest in politics or ruling the country can also be doubted given the military's actions such as strengthening relations with other governments and entrenching itself as the ongoing ruler in Burma. [192]

4.1 Problems in Burma

A detailed history of Burma's judiciary is not appropriate here and has, in any event, been covered elsewhere.[193] It can be noted that Burma's first constitution (of 1947), which was subsequently removed by the military, provided some protection for the judiciary[194] and gave attention to impunity through guarantees of rights and judicial protection of these.[195]

The UN General Assembly has expressed concerns about impunity in Burma. The General Assembly has directed the military 'government' to fulfil its obligation to end the impunity of perpetrators of human rights violations, including members of the military. The General Assembly also called for all violations committed by government agents to be prosecuted.[196]

The Burmese military tells the international community there is no impunity in Burma.[197] Additionally, explains the military, 'Myanmar reaffirms her commitments to the principles and purposes of the UN Charter'.[198] In joining the UN Charter, countries agree to take action toward achieving universal observance of human rights.[199] The military goes further in relation to human rights, saying that they 'fully subscribe to the human rights enshrined in the Universal Declaration of Human Rights'.[200]

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Clearly, there is some disparity here. The military says things are OK. The UN members and other organisations have a different view. So how are we properly assess the state of impunity and judicial independence in Burma at the current time?

The military's attitude toward judicial independence can be understood from its executive order called the *Judiciary Law 2000.*[201] The military's process for drafting a constitution also contains some provisions for judicial independence.[202] Close analysis of both developments reveals serious deficiencies in relation to judicial independence and impunity.

The *Judiciary Law 2000* is similar to the military's *Judiciary Law 1988.*[203] The 2000 order is little more than an English-language translation of the 1988 order from Burmese language. The *Judiciary Law 2000* has no provision for how judges are to be appointed, how they can be removed, or their conditions of service. These matters do not appear to be provided in any other current law or constitution in Burma, and so are left to the mili-

tary's discretion.[204] The *Judiciary Law 2000* provides no security of tenure for judges.[205] The only reference to 'independence' in the *Judiciary Law 2000*, is a circular provision that appears to be a general statement imposing no obligation on the military regime or any other party: 'The administration of justice shall be based upon...administering justice independently according to law'.[206] Could this clause be a direction for the military government and judges to respect and act in accordance with judicial independence? Two reasons show the clause cannot be understood in such a way. The first is that the clause also provides that, 'The administration of justice shall be based upon...restor[ing] regional peace and tranquillity'.[207] This is hardly a appropriate task for an independent judiciary.

The second reason why clause 3(a) of the *Judiciary Law 2000* does not provide judicial independence can be understood from a historical perspective. The *Judiciary Law 2000* appears to have origins in Burma's 1974 Constitution. The table below compares the main clause of 2000 military order with the 1974 constitutional provisions (the relevant clause of the 1974 Constitution is included in full, but re-ordered to allow direct comparison):

Article 3 of the *2000 Judiciary Law*	Article 101 of 1974 Constitution
The administration of justice shall be based on the following principles:-	Administration of justice shall be based on the following principles:-
(a) administering justice independently according to the law;	(c) to administer justice independently according to the law;
(b) protecting and safeguarding the interests of the people and aiding in the restoration of law and order and regional peace and security;	(b) to protect and safeguard the interests of the working people;
(c) educating the people to understand and abide by the law and cultivating in the people the habit of abiding by the law;	(d) to educate the public to understand and abide by the law
(d) working within the framework of the law for the settlement of cases;	(e) to work within the framework of the law as far as possible for the settlement of cases between members of the public;
(e) dispensing justice in open court unless prohibited by law;	(f) to dispense justice in open court unless prohibited by law;
(f) guaranteeing in all cases the right of defence and the right of appeal under the law;	(g) to guarantee in all cases the right of defence and the right of appeal under law;
(g) aiming at reforming moral character in meting out punishment to offenders.	(h) to aim at reforming moral character in meting out punishment to offenders.
	(a) to protect and safeguard the Socialist system;

The relevant clauses of the *Judiciary Law 2000* and the 1974 Constitution are almost identical. As noted above, the *Judiciary Law 2000* is simply a military order and can be amended by any subsequent order. So the relevant clause in the *Judiciary Law 2000* cannot provide any greater protection than the identical clause in the 1974 constitution, which was binding on the executive, courts and parliament. The system of judicial independence provided by the 1974 Constitution is therefore relevant to understand how the *Judiciary Law 2000* may operate. The judicial system under the 1974 constitution was that judges were members of parliament[208] and responsible to parliament.[209] There were no minimum qualifications for judicial appointment in 1974, and among the country's top five judges, only one was a lawyer.[210] The 1974 Constitution prevented the courts from reviewing government actions or interpreting laws - these functions were made the sole preserve of the parliament.[211] The parliament operated in a one-party state, with the constitutionally-protected party (the military) specified to 'lead the state'.[212] Judicial power was also the responsibility of this skewed parliament.[213] Clearly, there was no judicial independence under the 1974 system. Therefore, repeating the 'independence' clause from the 1974 constitution, by enacting it as a military order, provides no relevant independence today.

More contemporary information on Burma's judiciary is available from reports and statements by the military and other Burmese officials. Even on these reports, concerns arise, as the following examples show.

(a) *The courts are expected to work under the military's guidance*
A coordination meeting of judges throughout Burma was addressed by the country's Chief Justice, U Aung Toe. His Honour said 'In assessing their work and laying down future tasks, judges should work in line with the guidance given by the Chairman of the State Peace and Development Council [the current name by which the military refer to themselves]'.[214] As shown in the various standards discussed above (section 3), judges should be following and applying the law, not working in line with guidance from a military general.

(b) *The Chief Justice considers the courts part of administration*
A refresher course for judicial officers was also addressed by the Chief Justice who '[C]alled on them [judicial officers] not to lose sight of the policies practise [sic] by the Government. …[and also] called on them…to cooperate with other departments and bodies to ensure correct disposal of cases in accord with the law and to mete out deterrent punishment'.[215] Independent judicial processes should be considering only the law, not government policy.

The relevant clauses of the Judiciary Law 2000 and the 1974 Constitution are almost identical. ...[T]here was no judicial independence under the 1974 system. Therefore, repeating the 'independence' clause from the 1974 constitution, by enacting it as a military order, provides no relevant independence today.

(c) *Financial links between judiciary, politics, and the military*
At the refresher course, the participants each donated 5,000 kyat (Burmese monetary units) for various matters including the National Convention and the Union Solidarity and Development Association. The National Convention is a political process responsible for drafting a new constitution for Burma. It is inappropriate for the judiciary to be financially involved in creating a country's constitution because any future constitution will need to guide, and be interpreted by, by that judiciary. The Union Solidarity and Development Association is described in a UN report as being under the complete direction and control of the military and used for its purposes.[216] The military explain the Association's purposes include strengthening state sovereignty and safeguarding territorial integrity.[217] Financial connection between the judiciary and such an organisation is inappropriate.

(d) *The Chief Justice's role in political and governmental and political processes*
In mid 2003, the Chief Justice stated the need for defence services to have a 'leading role in national politics'.[218] He also chaired the Constitutional Convention, a political process responsible for drafting a new constitution.[219] This degree of involvement in both these activities is difficult to reconcile with a judicial officer maintaining the independence necessary to properly perform a judicial role.

(e) *Military's appointment and dismissal of judges*
The current Chief Justice was appointed by the military in 1998. This was done by a military decree which also effectively dismissed over 60 judges, closed the courts until mid 1989 and established military tribunals.[220] An order of the military in late 1998 recorded that five (of the six) Supreme Court Judges were 'permitted' to retire.[221] The military's order gave no reasons for the resignation,[222] and simply announced four replacement judges. The possibility of 80% of the Supreme Court judiciary simultaneously retiring is so unlikely that the event raises questions as to the independence and autonomy of Burma's judiciary.

The above points indicate the operation of Burma's courts falls short of relevant international standards. The judicial system does not meet the principles in the UDHR; principles which the military said it has accepted. The activities also fall short of the ICCPR. More significantly, the activities and the situation of judges in Burma is contrary to the minimum standards that Burma's Chief Justice indicated were necessary in signing the Beijing Principles. The shortfalls have been criticised by the UN, which has noted Burmese law does not provide security for judges

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or protect them from arbitrary removal, leaving such matters entirely in the military's control.[223]

So, even if we simply use the military's information and actions, problems are clearly apparent. And it should be noted there is substantial reason to doubt the veracity of some of the military's statements. The actual situation in Burma seems far more troubled, as indicated in many UN and other reports about Burma.[224] A UN report about Burma noted the courts provide a formal legitimacy to the military's rule but in reality there is no substantive support for the military's suppression of human rights.[225] This is corroborated by the many reports of abuses to the system resulting in an absence of the rule of law.

The absence of an independent judiciary has compromised legal proceedings in Burma. Over the last five years, several cases have been brought by the National League for Democracy ('**NLD**'). The NLD, as the successful party in Burma's most recent elections, is the legitimate government of the country. The NLD brought various legal cases before Burma's courts, seeking orders against military officials and the Election Commission. The proceedings were in relation to the failure to implement the 1990 election results, and harassment of NLD officers. The cases were not permitted to proceed because they needed 'government' approval, which the military did not give.[226]

4.2 Possibilities for improvement in Burma

The situation in Burma requires prompt and effective action. Other countries in the Asian region provide sufficient warning of the difficulties caused by a long-term absence of an independent judiciary.[227] This section of the article outlines various matters that could assist in strengthening judicial independence in Burma. This includes points that can be made to encourage the military to address judicial independence and impunity, and also strategies that can be pursued independently of the military's actions.

Even though Burma is not a party to the ICCPR, the ICCPR still outlines accepted international standards. Recall:

- the ICCPR is essentially further specification of some of the rights in the UDHR, and the military says is adheres to the UDHR; and
- Burma's Chief Justice, in joining the Beijing Principles, has accepted that the ICCPR provisions on independent judiciary represent the minimum standards necessary to maintain an inde-

pendent and effective judiciary.

The matters outlined in 4.1 (above) demonstrate Burma does not meet the ICCPR standards. Critically, there is no effective statutory or constitutional protection for an independent judiciary. Burma's only current provisions about an independent judiciary are contained in executive orders, and even they are of negligible use.

The situation is also inconsistent with provisions in the *Vienna Declaration and Program of Action* on judicial independence and action against impunity. Burma's military joined the Vienna world conference that adopted the Vienna Declaration by consensus.[228]

So, by reference to ICCPR and the Vienna Declaration, it can be authoritatively shown that the military is failing to meet minimum international standards. These are standards that the military has accepted as relevant and important.

The military's statements should be used, wherever possible, in assessing the situation in Burma. As shown above, there are many examples where the military's own information can be used to demonstrate the changes that are required. Another example of using the military's positions could be from their statement to the UN General Assembly that 'everyone who visits Myanmar can see…peace and tranquillity prevailing throughout the nation. I would like to invite all of you to come and see for yourselves. Seeing is believing'.[229] Perhaps this statement could be used as the basis for all relevant UN and other international observers to visit the country to examine the situation?[230]

It may seem a trite observation, but attention must be given to finding ways inside Burma to strengthen the rule of law. Simply criticising the military and seeking international support is unlikely, of itself, to achieve much. Examples from the Philippines and Cambodia show that strengthening judicial independence requires considerable effort from all quarters: the legal profession, tertiary education, human rights awareness for law enforcement and government officials, and citizens' trust in and respect of the courts. Parties should take whatever opportunity exists in Burma to press legal proceedings. Even where proceedings are unable to improve the situation because of problems with impunity and lack of judicial independence, they serve two importance purposes. Firstly, they show parties are endeavouring to exhaust all possible avenues within the country. This is a necessary step before accessing various international processes. Secondly, the proceedings will serve to further and clearly demonstrate the extent of the problems in Burma. Legal proceedings will collate and set

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out the relevant facts and show there is no remedy for the various violations.

It should not be thought that the situation in Burma is starting from scratch. One commentator records that 'from 1948 to 1962, the judiciary in Burma was independent'.[231] While there are many problems with the country's subsequent governance under 40 years of military rule, there are basic concepts and institutions that can be used and strengthened for future development. A study of the 1998 reported cases in Burma suggests that, outside of political cases or cases in which the military has an interest, the legal system is operating acceptably.[232] The military's unexplained replacement of 80% of the Supreme Court judiciary in November 1998 perhaps indicates there was a degree of independence operating until that time.

A large obstacle to fair trials occurring is the presence of corrupt judges and a weak legal profession.[233] Therefore, one of the more important issues is for a credible 'audit' to be made of the current judiciary in the country. Judges appointed by the military should be reviewed, ideally in accordance with the draft principles prepared in the UN's Sub-Commission for Human Rights.[234] These principles direct that the rule of law must be observed, even in relation to judicial appointments. Judges can, and should, be removed if they have been unlawfully appointed or derive their judicial power from an act of allegiance.[235]

Certainly, judicial independence is primarily in the control of parliament and government. Parliament and the executive need to establish and respect a system of judicial independence. However, there is also an important role for judges themselves. As the ICCPR and the Beijing Principles indicate, judges must act so as to uphold their integrity and independence. Where judges allow their activities to become part of politics and parliamentary process, the judges themselves become part of the problem to be addressed.

While there are many problems with the country's subsequent governance under 40 years of military rule, there are basic concepts and institutions that can be used and strengthened for future development.

Turning from matters to be considered inside Burma, there are range of options at the international level.

Other countries have made use of international assistance in dealing with allegations of violations in their history. Experience from these can assist in considering Burma's future. A body comprising both national and international judges has been, or is being, established in East Timor and in Cambodia. These examples demonstrate that, in dealing with allegations of abuses under previous rule, it is important to have:

- steps to ensure that the tribunal would be protected against undue pressure;

- satisfactory arrangement for the arrest of suspects;
- requirements for the assessment of evidence;
- appeal procedures; and
- a satisfactory mechanism for appointing judges, prosecutors and other professional staff.[236]

Consideration should be given to possibilities of legal proceedings in other countries, using universal jurisdiction. Particularly relevant could be neighbouring countries with substantial judicial and enforcement institutions, such as India and Thailand. The developments concerning General Pinochet in England assisted moves against impunity in his home country, Chile.[237] Current pressure from UN prosecutors to have an arrest warrant issued against former Indonesia General Wiranto could see him facing arrest in any country he travels to outside of Indonesia and subsequent extradition to East Timor to face charges.[238]

There are a range of UN options available that may assist in increasing attention on (and, hopefully, assistance with) the judicial and impunity problems in Burma. Obviously, the various Special Rapporteurs and Working Groups of the Commission on Human Rights are one avenue. These parties receive information and provide annual reports to the Commission. The Commission also maintains direct carriage of some issues, including impunity. For instance, the 2003 Commission on Human Rights passed a resolution on impunity requiring the UN's Secretary General, the High Commissioner for Human Rights and Special Rapporteurs to investigate and report on impunity related issues.[239] Information about impunity in Burma could be provided to the relevant UN officials.

In concluding this section, it seems there are two key areas requiring attention if there is to be any progress toward judicial independence in Burma.

(a) Changes are needed in the country's legal structure and laws. The country needs a constitution with provisions supporting judicial independence and opposing impunity (defining and protecting a parliamentary, executive and judicial arm of government would be a start!). The law and order system also needs to be adequately resourced; both in terms of operational funding and capable personnel.

(b) There needs to be changes in practices and policies. Judges should, wherever possible, advocate and act for their independence. The judiciary could use the opportunities already existent. For example, the *Judiciary Law 2000* enables rules to be made; and while some rules may have been made, the role of judges could be further

Consideration should be given to possibilities of legal proceedings in other countries, using universal jurisdiction. Particularly relevant could be neighbouring countries with substantial judicial and enforcement institutions, such as India and Thailand.

strengthened and protected through this process

Obviously, no one should expect rapid improvements in judicial independence. There are unlikely to be significant changes immediately - perhaps a transitional government may be necessary - but any attention to the issue will assist in the long, slow process. An interesting observation was made in relation to South American countries, where impunity has been addressed over time: 'Democratic governments become more confident, prosecutors more daring, the public more inclined to so something about old men whose behaviour in uniform had brought their country international contempt'.[240] The same could be observed of Indonesia and, if progress is made, this may be a future for Burma?

(5) Conclusion

There is little in this article which is new to discussion of Burma's situation. The military regime will have heard all the usual calls: 'have an independent judiciary', 'respect human rights', 'observe the rule of law'. What this article has sought to show, through reference to standards the regime has already accepted, is that even on the military's own actions and statements there is a pressing need for judicial independence. It is hoped that by demonstrating the need for judicial independence in this way, greater pressure can be brought for change in Burma.

In summary, Burma is failing to meet international standards on judicial independence by not providing courts that have been established by law. What 'laws' the country currently observes on judicial independence are only military orders, and their status and content contravene relevant international standards (including the ICCPR, Beijing Principles, and decisions of international tribunals).

Developments in relation to impunity and judicial independence seem to go up and down, demonstrating that human rights are not the main determinant of government activity. Decisions and actions are taken on the basis of many factors. Sometimes the result is beneficial to human rights, but sometimes it is not. There are many areas requiring attention, but this article suggests a critical area is the state of the judiciary and the rule of law.

Why always so much focus on court structure and rule of law? There are many other pressing issues, such as torture, freedom of speech, forced labour. There are also things other than the judiciary that need improving to properly address impunity (such as police resourcing, political will,

etc). However, without a properly functioning judicial system, any improvement in these areas is likely to be unsustainable. Without a working court system, it is difficult to see how much security will be available to any other human rights or activity in Burma. The rule of law and the role of courts show the importance in these institutions working properly: they resolve disputes between citizens; provide a system for state regulation of citizens who don't follow rules; determine whether parliament operating properly and laws are valid; determine whether executive action and policies fair and following rules; and provide an accountability for government officials.

Perhaps a suitable conclusion to this article is a quote from the Spanish Judge, Baltasar Garzon, who issued the warrants for Pinochet's arrest. The quote provides a good example of the role of judicial independence, the rule of law, and impunity. Prior to the Pinochet case, the Judge was investigating the involvement of government security forces in the murder of various anti-government parties. His Honour ordered two suspected police officers to be arrested, and a friend cautioned whether the Judge should be taking this action in relation to government officials. Judge Garzon responded:

> *It's very simple: they either have to change the law so they can kill people, or they have to respect it.*[241]

FOOTNOTE

The bulk of this article was researched and written in 2000. The events of September 2001, and responses to those events, have impacted on issues of impunity and the rule of law.[242]

The international NGO, Human Rights Watch, recently criticised US troops for operating outside the rule of law in Afghanistan through arbitrarily detaining civilians, using excessive force during arrests of non-combatants, and mistreating detainees.[243] Another obvious 'rule-of-law' problem is the US's maintenance of an off-shore detention centre at Guantanano Bay, Cuba. People have been held without trial, largely insulated from the US and other legal processes.[244] Some are now being released without ever having being charged, despite their being detained for over two years.[245] In a highly illuminative media release, the US Department of Defense explained:

> The Department of Defense announced…119 detainees have been released…

There are many other pressing issues, such as torture, freedom of speech, forced labour. However, without a properly functioning judicial system, any improvement in these areas is likely to be unsustainable. Without a working court system, it is difficult to see how much security will be available to any other human rights or activity in Burma.

> The decision to transfer or release a detainee is based on many factors, including whether the detainee is of further intelligence value to the United States and whether he is believed to pose a threat to the United States.
> …We make a determination about the detention and release of a detainee based on the best information and evidence we have at the time. …[T]he department expects there will be other transfers or releases of detainees. Because of operational and security considerations, no further details can be provided.
> …[T]here are approximately 610 detainees at Guantanamo Bay, Cuba [246]

In February 2004, the US authorities indicated that other people may still be detained even if military tribunals find they are innocent, or once they serve their sentence for any offences made out.[247]

At the international level, a serious issue arises on the international legal basis for the attack on Iraq by the US/UK and the 'coalition of the willing'.[248] The lack of UN Security Council support for the attack has led to both US and UK officials to undermine the authority and role of the UN.[249] Together with Australia, those governments have made increasing calls for the role of 'pre-emptive strikes', taking the use of force further outside international regulation.[250]

This disregard for the rule of law raises very serious questions as to who is making the decisions? And how and why are these decisions being made? Accountability is disappearing.

The start of this article posed the question, 'is there a trend toward increasing observance of the rule of law?' These post 2001 developments, and others closer to the region (two examples include extra-judicial killings in Thailand, and Australia's attitude to the UN and international law) suggest that the answer to that question is 'no'.

Endnotes

* Senior Policy Officer, Human Rights and Equal Opportunity Commission (Australia); LLB; Barrister and Solicitor of the Supreme Court of Western Australia

1. 'Set Of Principles For The Protection And Promotion Of Human Rights Through Ac-

tion To Combat Impunity', contained as Annex II in the report, *Question of the impunity of perpetrators of human rights violations (civil and political*), United Nations document ('**UN doc**') E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997

2. *Report of the Working Group on Arbitrary Detention*, UN doc E/CN.4/1999/63, 18 December 1998, para 49
3. 'Recently [Wahid] surprised Indonesians by announcing an inquiry into the massacres of communists and alleged communists in the mid-1960s. Yet he has already said he will pardon former President Suharto for any human rights abuses of which he may be found guilty. In this Wahid seems to be following the most sensible and courageous path. His model is similar to South Africa truth and reconciliation process. Get the truth out there, but do not plunge the country into civil war', newspaper article, *Wahid's Way,* Weekend Australian newspaper (Australia) 18 March 2000, p26
   The Indonesian government establishing Commission which was wide-ranging in its enquiries into officials and units. Newspaper article, *Johnny Lumintang Investigated over May 5 Cable*, 24 December 1999, Kompas Online (Indonesia)
4. A report by an investigation team of the Indonesian Human Rights Commission on East Timor implicated many officials, including six generals, as involved in the violations: article, *Justice for the Victims in East Timor*, 1 February 2000, suratkabar (indonesian daily news online);
   Indonesia's military commander was asked to leave his post, he refused and was suspended and later resigned (BBC 17/5)
   Indonesia's President Wahid also apologised for past abuses in East Timor and there have been trials of army officials (BBC 23/4)
5. BBC news, *Israeli army conviction praised*, <http://news.bbc.co.uk/2/hi/middle_east/3522879.stm>, accessed 2 March 2004
6. The Cambodian Government and the United Nations agreed on a Khmer Rouge war crimes trial, with an international style court to be established in Phnom Penh, comprising both foreign and Cambodian judges with courtroom decisions requiring agreement from both Cambodian and international judges, article, *Cambodia, UN agree on Khmer Rouge trial*, 30 April 2000, ABC News Online (Australia)
   See also report to UN's 2000 Commission on Human Rights ('**CHR**') by UN Secretary-General's representative for human rights in Cambodia, *Situation of human rights in Cambodia*, UN doc E/CN.4/2000/109, paras 30-32
   And AFP report, *U.N. Heads To Cambodia To Finish Khmer Rouge Tribunal Budget*, 5 March 2004, reported at <www.unwire.org/UNWire/20040305/449_13728.asp>, accessed 8 March 2004
7. UN CHR resolution, *Impunity*, UN doc E/CN.4/RES/2002/79, preamble para 11
8. Article, 'Abdullah's war on corruption makes political sense', *The Nation* newspaper (Thailand), 25 February 2004
9. For a discussion of the proceedings in the UK, see note 33 below and the corresponding text;
   At the time of writing, courts in Chile have ruled that Pinochet was not entitled to immunity and can be charged in relation to alleged crimes committed during his rule, (BBC 25/7)
10. The International Criminal Court ('**ICC**') came into being in July 2002. For more discussion of ICC, see note 56 below and corresponding text
11. For example, the Malaysian Constitution has many protections of basic rights (liberty; due process; freedom of movement, freedom of speech, assembly and association; and right to property) but the constitution allows Parliament to legislate contrary to these protections in a variety of situations, *Justice in Jeopardy: Malaysia 2000*, report of a joint mission by International Bar Association, the Center for the Independence of Judges and Lawyers, Commonwealth Lawyers' Association and Union Internationale des Advocats, 2000, page 66
12. A Sajo & V Losonci, *Rule by law in east central Europe: is the emperor's new suit a straitjacket?*, 1993 as extracted in H Steiner & P Alston, *International Human Rights In Context: law, politics, morals*, 1996, Oxford University Press, United Kingdom, p722
13. R Coomaraswamy, *Uses and Usurpation of Constitutional Ideology* (1993) as extracted in H Steiner & P Alston (see note 13 above), p720
14. 'National Security Laws...including preventative detention laws...exclude the intervention of the judiciary. Though the International Covenant on Civil and Political

Rights has confined the operation of such laws to...exceptional circumstances...such laws are widely and routinely applied in most countries of the [Asian] region', *Statement of Asian Seminar on Fair Trial*, para 3.2, as reported in Asian Human Rights Commission (ed), *Decline of Fair Trial in Asia,* Asian Human Rights Commission, Hong Kong, 2000

15. G Robertson, *Crimes Against Humanity*, Penguin Press, United Kingdom, 1999, p238
16. '…in some cases recommendation made by such commissions [here, referring to specialised government appointed tribunals of enquiry, but reflections the same] are not followed in practice…and become tools used to evade the obligation to undertake thorough, prompt and impartial investigations into violations…' *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions* to the 1996 UN General Assembly, UN doc A/51/457, 7 October 1996, para 124
17. '[W]hat the history of 'transitional justice' - or the lack of it - in Latin America demonstrates in the longer term is that the emergence of any measure of truth is not a basis for reconciliation. Quite the contrary, since revelation of the details of official depravity only makes the demand for retribution by victims...more compelling', G Robertson (see note 16 above), p253
18. From the Philippines: '[T]he enactment and enforcement of laws [often] favour only a few. The...privileged few capitalize on the failure of the government machinery to enact policies or to effectively enforce the law. Others abuse their authority and use their powers to circumvent the law... Most of the time the rich and powerful get away with it scot free... The weight of justice usually falls heavily on the poor and less privileged in favour of the rich and powerful' from 'Enhancing Access of the Basic Sectors to the Judiciary', a report prepared by UN and Supreme Court of the Philippines, as extracted in AF Sarmiento, *Problems in fair trial: the Philippine experience* in Asian Human Rights Commission (see note 15 above), p51
19. The Dutch development organisation, NOVIB, made a presentation to the 1999 UN Commission on Human Rights, in which NOVIB addressed the problem of disappearances in Indonesia, noting this has been a problem for 30 years with the military's pervasiveness into society generating associated impunity: statement by NOVIB under agenda item 11 at 55th session of the UN CHR
20. 'Theravada Buddhism…preached the avoidance of violence [but] it also awarded merit to those in high positions', D Chandler *Cambodia's Historical legacy*, in 'Safeguarding Peace: Cambodia's Constitutional Challenge', issue 5 of *Accord: An International Review of Peace Initiatives*, 1998, Conciliation Resources, United Kingdom
21. 'National Security Laws...including preventative detention laws...exclude the intervention of the judiciary. … The habits formed by the use of such practices deeply infect the criminal justice system and create a counter culture among...law enforcement officers against the rule of law and the stipulations that must be observed in criminal investigations', para 3.2 of *Statement of Asian Seminar on Fair Trial*, as reported in Asian Human Rights Commission (see note 15 above)
22. An ex-Judge form the Philippines observed: 'The problem with the Integrated Bar [of the Philippines, or IBP, which all Philippines lawyers must join] is that for too long, it stood for the status quo. On September 21, 1972, a power and wealth-hungry president proclaimed martial rule. Less than four months later…the IBP was organized. Where was the IBP? I will tell you where. Behind the dictator himself, probably applauding. Fourteen years later, the people overthrew the dictator. As usual, the IBP was nowhere to be found, not until it was over, AF Sarmiento (see note 19 above), p89
23. 'The Indian situation is...a classic case of adequately effective provisions in the statutes, but wanton disregard for all such provisions in practice... The bane appears to be the unwillingness of the political executive to make the police machinery accountable to the law and to make it function to further the cause of the rule of law' PJ Alexander 'Fair Trial: The Indian Situation' in Asian Human Rights Commission (see note 15 above) p156
24. '[H]alf a century of living under Communist rule has left its impact…[With the change in the late 80's and early 90's] the system was rejected, but very often our methods of acting and a way of understanding public affairs or civic obligations has remained the same. Nor have political changes been accompanied by the disappearance of corruption, arrogance, violations of law or search how to circumvent it, lack

of enough respect for the authorities or other vices which we inherited from the previous system', M Nowicki *Impunity and the Post-Conflict Healing Process: States in Transition*, from 'International Conference On Human Rights Information, Impunity And Challenges Of The Post-Conflict Healing Process', Gammarth (Tunisia), 22-25 March 1998, as reported by Huridocs (Switzerland)

25. D Ashley, *Between War and Peace: Cambodia 1991-1998* in Conciliation Resources (see note 21 above)
26. G Robertson (see note 16 above), p190
27. '[In the peace process in 1993] the inclusion of all…factions…became the pre-requisite for a comprehensive settlement of the conflict acceptable to the superpowers; it would ironically often be argued that the Khmer Rouge were too 'military powerful' to be left out', D Chandler *Cambodia's Historical legacy* in Conciliation Resources (see note 21 above)
'[In 1987] The possibility of forming a coalition government between the PRK, FUNCINPEC and the KPLNF, excluding the Khmer Rouge, is rejected by the US and China', C Bergquist *Chronology* in Conciliation Resources (see note 21 above);and
'All five permanent members of the Security Council vetoed a provision in the final peace settlement [for Cambodia] which would have permitted prosecutions under the Genocide Convention', G Robertson (see note 16 above), p263
28. '[It is a mistake to] confuse the appropriate roles of political (and often economic) power, diplomatic efforts, military force and legal procedures. … The ICC's advocates make a fundamental error in trying to transform matters of power and force into matters of law' J Bolton, Vice-President of America Enterprise Institute and ex-Assistant Secretary of State for US government, prepared testimony to US Parliamentary hearing, *Is a U.N. International Criminal Court in the U.S, National Interest?*, hearing before the Subcommittee on International Operations, 23 July 1998, USA Government Printing Office, p50
'Americans [namely, US government officials] also ask how the Security Council could broker peace agreements if the [future International Criminal] court were going after prominent politicians or officials from any countries involved in the conflict', article *American objections to a strong international criminal court are misplaced*, 13 June 1998, The Economist magazine (UK);
29. '[Many] countries [have] chose[n] some form of impunity for their oppressors, and [these countries] are now stable members of the community of democracies … [E]very new democracy deals with its past in its own way. But an International Criminal Court would take away that choice. An independent prosecutor, answerable to no state or institution, would have the power to indict a nation's former leaders and overrule its national reconciliation process. … [T]he human rights campaigners [calling for an International Criminal Court with power to prosecute serious crimes wherever they occur] are unwittingly in league with tyrants', M Thiessen, *How Not to Get Rid of Dictators; No Tyrant Will be Willing to Give up Power if He Ends Up on Trial*, 17 July 2000, The Weekly Standard (USA), the author described as 'serving' on the majority staff of the USA Senate Foreign relations committee
30. 'The UN Secretary-General and his representatives recommended unconditional amnesty in their mediations over democratic change in South Africa and insisted upon protecting the genocidal Khmer Rogue – even assuring them posts in the new government – when it came to brokering a settlement in Cambodia', G Robertson (see note 16 above), p262
Also 'UN…officials…urged the US to foist an amnesty for Cedras and his army of killers upon President Aristide, against his will, was an essential condition of support for his return to Haiti. The UN Secretary General and his representatives recommended unconditional amnesty in their mediations over democratic change in South Africa', G Robertson (see note 16 above), p262
31. Terres des-Hommes-France, as reported in report of the UN Secretary General, *Impunity*, 23 December 1999, UN doc E/CN.4/2000/90, para 11;
'The lack of consensus among international actors on peace-building priorities has inevitably strengthened the hand of the country's political personalities. Stability provided by a 'strongman' has become more important for the international community than the democratic character of Cambodia's government', D Hendrickson and others *Introduction: Cambodia's constitutional challenge* in Conciliation Resources (see note 21

above)

32. Pinochet was arrested in October 1998 at the direction of a Spanish Judge who ordered Pinochet to be prosecuted in a Spanish Court. The House of Lords (England's highest court) ruled that Pinochet has no immunity and could therefore face trial on some of the charges. The English Courts subsequently ruled, that Pinochet should be committed, which under UK law then requires the order for extradition to be made by a UK government official.
33. '[Universal jurisdiction] supports Britain's…arrest, at the request of Spain, of former Chilean President…Pinochet for crimes against humanity committed during his… rule', Editorial of Times of India (1 August 1998), as reported in NGO Coalition for the International Criminal Court, *The International Criminal Court Monitor*, extracts reported at <gopher://gopher.igc.apc.org:70/00/orgs/icc/ngodocs/monitor/> accessed July 2000.
'[W]hile international prosecution plays an important role in encouraging compliance with international humanitarian and human rights laws, consistent enforcement largely depends on…the willingness of governments to bring alleged criminals to justice. … A growing number of States have started to do just that …. includ[ing] the United Kingdom's arrest, at the request of Spanish authorities, of former Chilean President Pinochet on charges of torture', UN Office for the Coordination of Humanitarian Affairs,<http://www.reliefweb.int/ocha_ol/civilians/justice_reconciliation/>, accessed 29 February 2004.
34. The Spanish Court rejected a challenge by State prosecutors [Spanish Government lawyers] to Spanish jurisdiction to try Pinochet: submissions by Amnesty International to House of Lords (UK) (October 1998) as reported at <www.derechoc.org/nizkor/chile/juicio/amicus.html>;
See also Equipo Nizkor *Spanish and Chilean Ministers accused of deliberate obstruction to justice*, 4 August 1999, reported at <www.derechos.org/nizkor/chile/juicio/ministers.html>;
The Spanish Government refused to forward a notice by the Spanish Judiciary of appeal against the UK's eventual decision to release Pinochet: S Joseph, 'UN Human Rights Treaty Bodies: Recent Decisions', in Vol 3, No 2, *Human Rights Law Review*, Autumn 2003, p 296
35. The UK government official ordered, in March 2000, that Pinochet not be extradited and instead be released, on the grounds that he was unfit to stand trial. The UK government acknowledged that 'in some circumstances, it may be appropriate...to have regard to political, economic or diplomatic interests of the United Kingdom in [deciding on] extradition', statement and letters from UK Secretary of State (2 March 2000) as reported at <http:\\news2.thls.bbc.co.uk/hi/english/uk_politics/newsid_663000/663444.stm>
36. The Economist magazine reported on court proceedings in Senegal dismissing torture charges against former rule of Chad. Noted as Africa's first case of a head of state being arrested in another country for crimes committed during the head's rule. Concerns expressed about the Senegalese government interference 'which resulted in the case collapsing', The Economist magazine, 14 July 2000
37. '[S]tates [have] failed to exercise universal jurisdiction over grave crimes under international law committed since that war [1939-45] ended even though almost every single state is party to at least four treaties giving states parties universal jurisdiction over grave crimes under international law', Amnesty International *UNIVERSAL JURISDICTION: 14 Principles on the Effective Exercise of Universal Jurisdiction* (1999) as reported at <www.igc.org/icc/html/ai199904.html>
38. '[C]riminal…[law has] traditionally understood to be primarily, if not exclusively, controlled by the law of individual states' and developments of international authority in criminal law 'would greatly enhance the perceived legitimacy of international law as against traditional notions of state sovereignty', L Andrews, *Sailing around the flat Earth: the International Tribunal for the Former Yugoslavia as a failure of jurisprudential Theory*, 1997, Emory International Law Review, Vol 11 No 2
39. During a debate by the US Parliament's Subcommittee on International Operations, the committee's chair observed: 'The United States must aggressively oppose this court each step of the way, because the treaty establishing an international criminal court is not just bad, but I believe it is dangerous. …At present international law re-

garding peace and security is largely whatever the Security Council says that it is. [*The US, together with the other four veto-holder, has control of the Security Council decisions*] With the creation of the International Criminal Court, that will no longer be the case', Senator R Grams, hearing before the US Subcommittee on International Operations (see note 29 above)
This approach appears to have wide-spread support among the USA government and commentators. See for example: the transcript and testimonies of the Chair of the Foreign Relations Committee, Vice-President of America Enterprise Institute and ex-Assistant Secretary of State for USA government, hearing before the US Subcommittee on International Operations (see note 29 above)

40. The US owes large debts to the UN. The UN operates on financial payments by UN member under a formula approved by all member countries. The US government refused to make payments for many years (another practise in which it finds itself in a minority because over 60% of countries had paid their dues to the end of 1998 <www.un.org/News/facts/finance.htm>). In mid-1999, the US Government owed the UN $1.6 billion in debts, representing two thirds of the total amount outstanding to the UN from all sources. In a peculiar understanding of usual debtor-creditor relations, the US Government stated it will pay some of the money it owed on various conditions, including that the UN 'not challenge US sovereignty', 'not charge…interest on arrears', 'respect US property rights', and that the UN undergoes numerous changes in its financial and organisational structure (including 'reduc[ing]…[the] assessment rate for UN regular budget [payments])': US Department of State, *US Plan for paying UN arrears*, 3 December 1999.
An indication of the US Government's motivation for making partial payment is given in its press release stating the payments 'will be sufficient to avoid automatic loss of…vote in the UN General Assembly': US Department of State, *US Payments to the United Nations*, 21 December 1999. The same press release included the interesting statement suggesting that the payment of 'arrears…is critically important to supporting the US leadership in the United Nations'
41. Senator R Grams, hearing before the US Subcommittee on International Operations (see note 29 above), p2
42. Document of UN Sub-Commission Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights)*, UN doc E/CN.4/Sub.2/1997/8, 27 June 1997
43. UN Sub-Commission report (see note 43 above), para's 43-47
44. UN Sub-Commission report (see note 43 above), para 50
45. UN Sub-Commission report (see note 43 above), para's 54-62
46. UN Sub-Commission report (see note 43 above), para's 68-70
47. UN Sub-Commission report (see note 43 above), para's 45 & 50
48. UN Sub-Commission report (see note 43 above), para's 21-22
49. UN Sub-Commission report (see note 43 above), para 16
50. The International Commission of Jurists reports on the 2000 meeting of the UN CHR as making slow progress on forming several important standards that could assist in alleviating impunity…[including]…the Guidelines on Impunity', summary of 2000 UN Commission on Human Rights, <www.icj.org/un/item20.htm>, accessed 2000
51. Amnesty International states of the Nuremburg trials: 'In 1945, the courts of the victorious Allies began exercising universal jurisdiction…on behalf of the international community over crimes against humanity and war crimes during the Second World War', Amnesty International, *UNIVERSAL JURISDICTION: 14 Principles of the Effective Exercise of Universal Jurisdiction*, 1999, as reported at <www.igc.org/icc/html/ai199904.htm> accessed 1999/2000
52. G Robertson (see note 16 above), p95
53. The UN Security Council passed resolutions establishing two tribunals. One tribunal is empowered to prosecute 'persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991' (Statute of the International Criminal Tribunal for the Former Yugoslavia, article 1). The second tribunal is empowered to prosecute 'persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of

neighbouring States between 1 January 1994 and 31 December 1994' (Statute of the International Tribunal for Rwanda, article 1).

54. Prof G Nieman during interview, *International Law and the Challenge of Conflict*, ABC radio, 25 February 2004, <www.abc.net.au/rn/talks/lnl/audio/LnL_25022004.ram>, accessed 4 March 2004
55. The ICC only has jurisdiction over four crimes: genocide, crimes against humanity, aggression, and war crimes (and these require a systematic attack, not isolated examples). Although approving of the development of the ICC, many human rights defenders considered it is not sufficient to tackle impunity and achieve justice, for three main reasons:
    * it only has jurisdiction over people in three situations (art 12 of the ICC Statute - see note 112 below): (1) where the Security Council refers it; (2) the accused is a national of the country that ratifies the treaty or agrees to the ICC hearing the matter, or (3) the alleged crimes occurred in a country that has ratified or agrees to the ICC hearing the case;
    * countries, even after ratifying the ICC Statute, can limit the Court's jurisdiction for seven years after ratification (art 124); and
    * the ability of the UN Security Council to delay proceedings (art 16).

    See Declaration of the Hague, *The Civil Society of the Global South supports the establishment of an International Criminal Court*, and also concerns discussed in NGO Coalition for an International Criminal Court, *Governments Approve Rome Statute for an ICC*, The International Criminal Court Monitor, issue 9, August 1998
56. One commentator suggests a reason for government opposition to the ICC is that 'Unlike [previous methods such as sanctions and military action] whose impact is often felt most heavily by the general population, or…on the rank-and-file soldiers on the front line, the threat of justice can be directed precisely at the political leaders and military commanders who are responsible for mass slaughter', K Roth, 'The Court the US Doesn't Want', in *New York Book Review*, 19 November 1998

    A former US Government Minister and then Vice-President of the American Enterprise Institute said 'Our main concern here…is not the [ICC's] Prosecutor will target for indictment the isolated US soldier … Our main concern should be for the President, the Cabinet Officers who comprise the National Security Council, and other senior civilians and military leaders responsible for our defence and foreign policy', hearing before the US Subcommittee on International Operations (see note 29 above)
57. 'Many of the governments with which the Inter-American Commission and Court have had to work have been ambivalent towards those institutions at best and outrightly hostile at worst', H Steiner & P Alston (see note 13 above), p641
58. A Pallinder's summary report on *International Conference on Human Rights Information, Impunity and Challenges of the Post-Conflict Healing Process*, Gammarth (Tunisia), 22-25 March 1998, Huridocs, p3
59. For example, UN CHR resolutions entitled, *Impunity*, eg. UN doc E/CN.4/RES/2002/79 (25 April 2002), UN doc E/CN.4/RES/2003/72 (25 April 2003)
60. UNCHR 2003 resolution, *Impunity* (see note 60 above), para 8
61. UNCHR 2003 resolution, *Impunity* (see note 60 above), para's 3-4
62. UNCHR resolution, *Extrajudicial, summary or arbitrary executions*, UN doc E/CN.4/RES/1999/35, 26 April 1999, para's 3 & 4
63. UNCHR resolution, *Situation of human rights in East Timor*, UN doc E/CN.4/RES/1999/S-4/1, 27 September 1999, para 4
64. Full title 'Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment', 1999 report is UN doc E/CN.4/1999/61, 12 January 1999
65. The working group comprises five independent experts. Their 1999 report to the UNCHR is UN doc E/CN.4/1999/63, 18 December 1998
66. Full title 'Working Group on Enforced of Involuntary Disappearances', 1999 report to the UNCHR is UN doc E/CN.4/1999/62, 18 December 1998
67. UN General Assembly document, *Human Rights Defenders*, UN doc A/56/341, 10 September 2001, para's 9-19
68. Oral report of Special Rapporteur on Torture to 1998 UN General Assembly, 5 November 1998, annex to the Special Rapporteur's report to the 1999 UNCHR, UN doc E/CN.4/1999/61, 12 January 1999, para 37
69. Report of the CHR's 'Special Rapporteur on Extrajudicial, Summary or Arbitrary

Executions' to the 1996 UN General Assembly, UN doc A/51/457, para 120
70. General Assembly resolution 217A(III), 10 December 1948,
71. L Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States* (1982) as extracted in H Steiner & P Alston (see note 13 above), p143
72. UDHR (see note 71 above), art 7
73. UDHR (see note 71 above), art 9
74. *International Covenant on Civil and Political Rights*, 1966 (entered into force 1976), 999 United Nations Treaty Series 171 ('**ICCPR**')
75. UN General Assembly resolution, *Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity,* resolution 3074 (XXVIII), 3 December 1973
76. UN General Assembly resolution (see note 76 above), principle 1
77. UN General Assembly resolution (see note 76 above), principle 6
78. UN General Assembly resolution (see note 76 above), principle 8
79. *Final report on the question of the impunity of perpetrators of human rights violations (economic, social and cultural rights)*, UN doc E/CN.4/Sub.2/1997/8, 27 June 1997
80. UN Sub-Commission document (see note 2 above)
81. The Sub-Commission transmitted the principles to the CHR 'with a view to its possible transmission to the GA' in resolution E/CN.4/SUB.2/RES/1997/28. The CHR, for its part, simply noted the principles and requested the Secretary General to collect comments on these principles: E/CN.4/RES/1998/53. This was repeated four years later: UN CHR 2002 resolution, *Impunity* (see note 60 above), para 12
82. Full name *Draft Code of Crimes Against the Peace and Security of Mankind* ,1996, UN International Law Commission as reported in UN document A/48/10
83. *Draft Code of Crimes* (see note 83 above), art 9
84. Information from the website of the Tribunal, <www.ictr.org/default.htm>, accessed 29 February 2004.
85. Decisions from the International Criminal Tribunal for the Former Yugoslavia have addressed issues such as the court's role and state sovereignty in relation to serious human rights violations. In its decisions in *Prosecutor -v- Dusko Tadic*, the Tribunal judges stated: 'It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity', and '[C]rimes which are universal in nature, well recognised in international law as serious breaches of international humanitarian law…transcend… the interest of any one State. …[T]he sovereign rights of States cannot and should not take precedence over the international community to act appropriately as they affect the whole of mankind and shock the conscience of all nations of the world': para's 58-59, 2 October 1995
86. UN General Assembly resolution, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN doc A/RES/40/34, 29 November 1985
87. UN General Assembly resolution (see note 87 above), principle 21
88. UN General Assembly resolution, *Action against Corruption*, UN doc A/RES/54/128, 17 December 1999
89. The *Basic Principles of the Use of Force and Firearms by Law Enforcement Officials* were developed over several years through meetings of international experts on crime prevention and control. The principles were adopted by a UN Congress on Prevention of Crime and the Treatment of Offenders in 1990 and were welcomed by the UN General Assembly in 1990 (resolution 45/166)
90. UN General Assembly resolution, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, UN doc A/RES/53/144, 8 March 1999
91. UN General Assembly resolution (see note 91 above), para 9
92. *Vienna Declaration and Programme of Action*, UN doc A/CONF.157/23, 12 July 1993
93. *Vienna Declaration and Programme of Action*, part II, para 60. The Declaration also supported efforts of the UN Commission on Human Rights and its Sub-Commission to examine all aspects of impunity: para 91.
94. UN General Assembly document, *Report of the United Nations High Commissioner for Human Rights*, UN doc A/56/36, 28 September 2001, para 63.

95. UN General Assembly document, *Human rights defenders: report of the Special Representative of the Secretary-General on human rights defenders*, UN doc A/56/341, 10 September 2001, para 9
96. UN General Assembly document (see note 96 above), para 15
97. UN General Assembly document (see para 95 above), para 71
98. UN General Assembly document (see para 95 above), para 71
99. Amnesty International, *UNIVERSAL JURISDICTION: 14 Principles on the Effective Exercise of Universal Jurisdiction*, 1999, as reported at <www.igc.org/icc/html/ai199904.html>
100. Submissions by Amnesty International to the House of Lords (UK) (October 1998) as reported at <www.derechoc.org/nizkor/chile/juicio/amicus.html>; see also notes 33-36 (above) and related text
101. One commentator traces legal responsibility of individuals for war crimes back to the 1400's including the Lieber Code in 1800's in America, being 'the first attempt to codify the laws or war' which envisaged individual liability for acts occurring in another country, E Greppi, *The evolution of individual criminal responsibility under international law*, 1999, 835 International Review of the Red Cross 531
102. G Robertson (see note 16 above), pp212-220; UN General Assembly document (see para 95 above), para 72
103. Including Australia, Austria, Belgium, Canada, Denmark, France, Germany, Israel, Italy, Sweden, Switzerland, and the United States of America.
104. *Convention on the Prevention and Punishment of Genocide* (1948)
105. *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (1984)
106. 'Many treaties, such as hijacking or anti-terrorism conventions, provide for states other than the state of nationality of the accused to exercise jurisdiction over persons accused of having committed the serious crimes within their scope [including hijacking/terrorism conventions in] 1969...1971...[and] 1979', Human Rights Watch, *The ICC Jurisdictional Regime; Addressing U.S. Arguments*, USA
107. The 1949 Geneva conventions
108. Amnesty International (see note 100 above)
109. Description of case in G Robertson (see note 16 above), pp236-237
110. International Council on Human Rights Policy, *Hard cases: bringing human rights violators to justice abroad*, 1999, Switzerland, pp35-37
111. *Rome Statute of the International Criminal Court*, UN doc A/CONF.183/9, 17 July 1998, articles 7 (crimes against humanity) and 8 (war crimes)
112. International Council on Human Rights Policy (see note 111 above), p38
113. International Council on Human Rights Policy (see note 111 above), p38
114. International Council on Human Rights Policy (see note 111 above), pp42-44
115. Human Rights Watch, *the Pinochet prosecution*, <www.hrw.org/campaigns/chile98/>, accessed 30 March 2004
116. R Burnside, *Rethinking Pacts*, <www.iir.ubc.ca/pwiasconferences/ threatstodemocracy/abstractspapers/submissionforspecial/ross.pdf>, accessed 29 February 2004
117. Even sportspeople are concerned about what the Pinochet development means - South African cricketer accused of match-fixing, Hansie Cronje 'cancelled a planned trip to London because of fears he might be arrested. Cronje was concerned he may be detained and forced to face match fixing charges in India', article *Cronje baulks at flight,* 21 July 2000, ABC News Online (Australia)
118. UN General Assembly document, *Report of the Special Rapporteur of the Commission on Human Rights on extrajudicial, summary or arbitrary executions*, UN document A/51/457, 7 October 1996, para 119.
119. See para 9 of *General Comment 13: Equality before the courts and the right to a fair and public hearing by an independent court established by law (Article 14),* 13 April 1984, as reported in UN doc HRI/GEN/1/Rev.6, 12 May 2003, p135
120. '[T]o help overcome this perception of selectivity [about the International Criminal Tribunals] and contribute to a more impartial and comprehensive approach to the problem of impunity ...[there should be established]...a permanent international criminal court...and adopt...a convention...which would provide domestic courts with international jurisdiction over persons suspected of having committed mass violations of the rights to life', report of the UN CHR's Special Rapporteur on extrajudicial, sum-

mary or arbitrary executions, UN doc A/51/457, 7 October 1996, para 127
121. G Robertson (see note 16 above), p247
122. *American Convention On Human Rights*, adopted 22 November 1969, article 1(1)
123. 'The…obligation of the States Parties…to 'ensure' the free and full exercise of the rights recognized by the Convention…implies the duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. …[This means] States must prevent, investigate and punish any violation of the rights recognized by the Convention', Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, judgment 29 July 1988, <www.corteidh.or.cr/seriecing/serie_c_4_ing.doc>, accessed 28 February 2004
124. Inter-American Court of Human Rights, *Velasquez Rodriguez Case*, para174.
125. H Steiner & P Alston (see note 13 above), p709
126. UN Centre for Human Rights, *National Human Rights Institutions: A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights*, 1995, United Nations, para 219
The UN Commission on Human Rights recently reaffirmed, 'primary responsibility for bringing perpetrators to justice rests with national judicial system' resolution on East Timor (see note 64 above) para4;
UN CHR resolution, *Integrity of the judicial system*, UN doc E/CN.4/RES/2003/39, 23 April 2003
127. UN Sub Commission document (see note 2 above), draft principle 18
128. 'The rule of law in any community is based first and foremost on the independence of the judiciary as an institution. Strict segregation must prevail between this and the other State powers', W Besson & G Jasper, 'The Rule of Law - Law and Justice Bind All State Authority', in J Thesing (ed), *The Rule of Law*, 1997, Germany, p81
129. W Besson and G Jasper (see note 129 above), p80
130. O Bahr, as reported in I Von Munch *Rule of Law Versus Justice* in J Thesing (ed) (see note 129 above)
131. '[T]he integrity of the judicial system is an essential prerequisite for the protection of human rights', UN CHR resolution (see note 127 above), preambular para 5
132. Reported in United Nations, *Independence of the Judiciary: A Human Rights Priority*, August 1996, UN doc DPI/1837/HR
133. UDHR (see note 71 above), article 7
134. UDHR (see note 71 above), article 10
135. 'An increasing number of conventions are now adopted and opened for signature by means of UN General Assembly resolutions [which cannot be passed without the support of the majority of the world's governments], such as the 1966 International Covenants on Human Rights', M Shaw, *International Law*, 1991, Cambridge University Press, United Kingdom, p638
136. ICCPR (see note 75 above), art 14(1)
137. The Human Rights Committee (body established under the ICCPR to monitor countries' compliance with the ICCPR) noted that governments should report on their 'relevant constitutional and legislative texts which provide for the establishment of the courts and ensure that they are independent, impartial and competent in particular with regard to the manner in which judges are appointed, the qualifications for appointment, and the duration of their terms of office; the conditions governing promotion, transfers and cessation of their functions and the actual independence of the judiciary from the executive branch and the legislative', *General Comment 13* (see note 120 above), para 3
138. Comment by Human Rights Committee (see note 120 above), para 4
139. *Basic Principles on the Independence of the Judiciary* endorsed by UN General Assembly resolution 40/32 (29 November 1985)
140. *Principles on the Independence of the Judiciary*, para 1
141. *Principles on the Independence of the Judiciary*, para 10
142. *Principles on the Independence of the Judiciary*, para 17-20
143. *Principles on the Independence of the Judiciary*, para 2
144. 'The principle of the independence of the judiciary...requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected', *Principles on the Independence of the Judiciary*, para 6

145. *Principles on the Independence of the Judiciary*, para 8
146. United Nations *Independence of the Judiciary: A Human Rights Priority* (see note 133 above)
147. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* adopted UN General Assembly resolution 40/34 (29 November 1985)
148. *Basic Principles of Justice for Victims*, para 5
149. *Basic Principles and Guidelines on the Right to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law*, in the report of Special Rapporteur to Sub-Commission on Prevention of Discrimination and Protection of Minorities, 24 May 1996, UN doc E/CN.4/Sub.2/1996/17107
150. Draft *Basic Principles and Guidelines on the Right to Reparation for Victims*, principle 4
151. Decision of International Criminal Tribunal for the Former Yugoslavia (Appeals Chamber) in *Prosecutor-v-Dusko Tadic* (see note 86 above), para 43. The Tribunal had earlier explained '[T]he principle that a tribunal must be established by law...is a general principle of law imposing an international obligation...[applying] to the administration of criminal justice in a municipal setting. It follows from this principle that it is incumbent on all States to organize their system of criminal justice in such a way as to ensure that all individuals are guaranteed the right to have a criminal charge determined by a tribunal established by law', para 42
152. Decision of International Criminal Tribunal for the Former Yugoslavia (see note 86 above), para 45
153. Draft Code of Crimes (see note 83 above), commentary 3
154. Draft Code of Crimes (see note 83 above), art 11(1)(a)
155. M de Guzman, *The Road from Rome: The Developing Law of Crimes against Humanity* (2000) Human Rights Quarterly 335 at 357
156. Human Rights Committee, General Comment 6 *The right to life,* 30 July 1982, as reported in UN doc HRI/GEN/1/Rev.6 (see note 120 above)
157. *Basic Principles on the Role of Lawyers*, adopted by UN Congress on the Prevention of Crime and the Treatment of Offenders (Cuba, 27 Aug to 7 Sept 1990)
158. *Guidelines on the Role of Prosecutors*, adopted by UN Congress on the Prevention of Crime and the Treatment of Offenders (Cuba, 27 Aug to 7 Sept 1990)
159. *Guidelines on the Role of Prosecutors,* para 13
160. *Guidelines on the Role of Prosecutors,* para 15
161. United Nations document (see note 133 above))
162. eg. Centre for the Independence of Judges and Lawyers 'CIJL observations on the 1995 Beijing Statement of Principles of the Independence of the Judiciary', in Centre for the Independence of Judges and Lawyers, *CIJL Yearbook: March 1998, Asian and Other perspectives*, 1997, International Commission of Jurists (Switzerland) p123
163. *Beijing Statement of Principles of the Independence of the Judiciary in the Lawasia Region,* 19 August 1995, as reported in Centre for the Independence of Judges and Lawyers (see note 163 above), p107
164. Text before the signatures of Chief Justices adopting the *Beijing Principles* (see note 164 above)
165. D Malcolm, *Introduction [to] The Beijing Statement of Principles of the Independence of the Judiciary* (1997) in Centre for the Independence of Judges and Lawyers (see note 163 above), p89
166. '[A]n independent judiciary is indispensable to the implementation of this right [ICCPR art 14]', *Beijing Principles* (see note 164 above), art 2
167. Judiciary must 'decide matters before it…without improper influence, direct or indirect, from any source', *Beijing Principles* (see note 164 above), art 3(a)
168. *Beijing Principles* (see note 164 above), article 3(b)
169. 'It is essential that…[judicial] independence be guaranteed by the State and enshrined in the Constitution or the law': *Beijing Principles* (see note 164 above), art 4. The principles also support independence by specifying standards for appointment and removal of judges (articles 12 and 22).
170. *Beijing Principles* (see note 164 above), article 7
171. *Beijing Principles* (see note 164 above), article 8
172. *Beijing Principles* (see note 164 above), article *9*
173. K Kumado, *Major Conflicts in the World from a Human Rights Perspective* (March 1998), as reported in A Pallinder (see note 59 above)

174. 'Over the years, the...[Indian] Courts have expanded through various [decisions]...the scope of the rights and freedoms given under the different provisions of the Constitution, to make them more real and available to all citizens of India', PJ Alexander (see note 24 above) p150
175. 'India had 3 wars with her neighbour Pakistan and one war with another neighbour China. In time of war, it is constitutionally permissible to declare emergency when all fundamental rights are suspended. But India did not. The spirit of constitution prevailed. There were occasions of aberration of constitution like internal emergency of 1975-77, abuse of Article 356 where elected state governments were dismissed and central rule improved. But the redeeming feature was that fundamental rights guaranteed in the Constitution could not be suppressed', BK Sen, *Burma greets Indian Republic on her 50 years*, 26 January 2000
176. 'True to the common law legal tradition, the principle of legality is deeply rooted in the law of Sri Lanka. Accordingly, nothing is criminal or punishable except what is expressly prohibited and made so punishable by statute law of Sri Lanka [the author then explains how this position has been confirmed by judicial decision]', A Fernando, *Fair Trial Issues in Sri Lanka*, in Asian Human Rights Commission (see note 15 above), p218
177. Decision of New Zealand's Court of Appeal in *Choudry-v-Attorney General (NZ),* 9 December 1998, judgment of Justices Richardson, Keith, Blanhcard and Tipping, p13
178. *Choudry-v-Attorney General (NZ)* judgment of Justices Richardson, Keith, Blanhcard and Tipping, pp17-18
179. *Choudry-v-Attorney General (NZ),* p32
180. From UN summary record of debate during 1999 UN Commission on Human Rights, UN document E/CN.4/1999/SR.13, para 59
181. 'In 1962, after General Ne Win took over the State Power, the...1947 constitution was abolished', from the military regime's web-site <www.myanmar-information.net/political/politic.htm>
182. 'In 1974 Burma Socialist Programme Party drafted a new constitution and it was prescribed and approved in a referendum… The Tatmadaw [army] assumed State power on 18 September 1988 and…from that time on the 1974 constitution was also invalid', from the military regime's web-site *Union Spirit*, <www.myanmar.com/e-index/Union/nat-con.html>
183. In May 1989, the military issued the *Peoples Assembly Election Law* (No 14/89), which stated that 'The Peoples Assembly [Parliament] shall be formed with the Peoples Assembly representatives who have been elected in accordance with this law': art 3.
    In June 1989, the military stated, 'The elected representatives can …form a government, and we will transfer power to the government formed by them', 43rd news conference, as reported in Burma Lawyers' Council, *The Military And Its Constitution In Burma*, 1999, Thailand, p6
    In May 1990, the NLD won over 80% of the seats in the parliamentary elections.
    Following the elections, the military issued Announcement No 1/90 indicating that the elected representatives cannot exercise legislative powers and they should draft a constitution. The military stated 'form[ing] a government will not be accepted in any way, and if it is done, effective action will be taken according to law', as reported in Burma Lawyers' Council, *The Military And Its Constitution In Burma*
184. The Parliament is to comprise two houses, being the People's Assembly (with 440 members, 110 of which are nominated by the military) and the National Assembly (with 224 members 56 of which are nominated by the military): the military's *Constitutional Principles approved by the National Convention*, chapter 'The Legislature', arts 3, 4 & 13
    The military's *National Convention Procedural Code* (1 January 1993) governs the workings of the National Convention in trying to draft the future constitution. The Code states that 'discussions and derivation are to be made within the context of the aims mentioned below [including]…participation of the military in the leading role of national politics in the future state', section 1(f)
185. SLORC, *Announcement on Separation of Power,* 27 July 1990, Announcement No. 1/90, as reported in M Weller (ed), *Democracy* and Politics in Burma, National Coalition Government of the Union of Burma, Thailand, 1993
186. See notes 182 and 183 above. It should also be noted, however, the military aren't

consistent on whether these constitutions were abolished. In its 43rd news conference, the military stated 'Presently we have two constitutions in our country; that is the 1947 Constitution and the 1974 Constitution … The elected representatives can choose one of the constitutions to form a government, and we will transfer power to the government formed by them', 9 June 1989, as reported in Burma Lawyers' Council (see note 184 above), p6

187. Referring to a provision in previous constitution, the military say 'This present military government has as all previous successive Myanmar Governments to continue in honouring this clause and the present national convention has also committed itself to continue in honouring the said clause. [And, referring to a law enacted in 1989 to give effect to the provision]…Importantly, Section (10-e) of the May 1989 Election Law is not created by the present military government, but was originally drafted…in [the] 1947 Independence Constitution which was later to be honoured and again put in the (1974) Constitution', document, *Practicing Universal Rules In The Protection Of National Security And Interest*, on the military's web-site <www3.itu.int/MISSIONS/Myanmar/psmrr12.htm>
188. The military attempted to retrospectively amend its laws for the 1989 election, after the election occurred: *Law Amending the Pyithu Hluttaw Election Law*, promulgated 19 July 1999, as reported in Burma Lawyers' Council, *Convening the People's Assembly: An analysis from legal perspective*, [*citation*]
189. 'The present government assumed State responsibility to restore stability…to the country… In the last few years the government has restored stability to the country' Regime's statement to the UN General Assembly 1998, 'Statement by His Excellency, Minister for Foreign Affairs…in the General Debate of the Fifty Third Session of the United Nations General Assembly', 30 September 1998, as reported on web-site of Permanent Mission of the Union of Myanmar to the United Nations and other International Organizations, Geneva, <www3.itu.int/MISSIONS/Myanmar/>
'The military is not interested in party politics', Military's report, *Political Situation of Myanmar And Its Role in the Region*, p20 <www.myanmar-information.net/political/english.pdf>, accessed 31 March 2004
190. "We think of ourselves as builder, carpenters and plumbers building a house not to enjoy ourselves but for the entire people who are rightful owners. When the building if finished, furnished and fine-touched, it will be handed over to them. The people will decide who shall manage the houses' Regime's statement to the UN General Assembly 1999, 'The statement made by His Excellency, U Win Aung, Minister for Foreign Affairs…at the 54th United Nations General Assembly' (24 September 1999), as reported as reported on web-site of Permanent Mission of the Union of Myanmar to the United Nations and other International Organizations, Geneva, <www3.itu.int/MISSIONS/Myanmar/>
191. 'The present government assumed State responsibility to restore stability…to the country… In the last few years the government has restored stability to the country' Myanmar Minister for Foreign Affairs (see note 191 above); also
'In Myanmar [Burma] today, security in her cities is fully guaranteed for the people, while now, peace and tranquillity prevail even in the border areas, for the first time in her modern history', from *Human Rights Issues and Democracy*, military regime's Geneva mission web-site <http://www3.itu.int/missions/myanmar/psmrr14.htm>
192. 'The State Law and Order Restoration Council...formed National Convention Convening Commission...to lay down fundamental principles for drafting an enduring State Constitution. The National Convention has been convened with...six objectives...[including] for the Tatmadaw [Burmese military]...to participate in the national political leadership role of the future State', from the military's web-site, *National Convention*, <www.myanmar.com/e-index/Union/nat_con.html>
193. Myint Zan, *Judicial Independence in Burma: No March Backwards Towards the Past*, 2000 (Vol 1 Iss 1) Asia-Pacific Law & Policy Journal; K Venkateswaran, *Burma: Beyond the Law*, 1996, Article 19, United Kingdom
194. Judicial independence was provided in the 1947 Constitution through protecting judges from arbitrary removal (s81), and others provisions regarding judges' remuneration and conditions of work (eg. ss141, 143, 144).
195. Fundamental rights were outlined in Chapter 2 of the 1947 Constitution, with the provision that a person can obtain 'redress by due process of law for any actionable

wrong suffered by' that person (s27).
It should be noted, however, that there were some matters in the 1947 Constitution, which could encourage impunity, such as: right of pardon is vested in the President (s60); complete protection for President except under impeachment procedures of constitution (s62); people with powers to regulate parliamentary business, procedures, or for maintaining parliamentary order cannot be questioned in Court on exercise of powers (s82)

196. UN General Assembly resolution, *Situation of human rights in Myanmar*, 17 December 1999, UN doc A/RES/54/186, para 15
197. 'His Government wished to make it clear that no one could be permitted to break the law with impunity', statement by U Mya Than of the military regime's delegation to the 2000 UN CHR, as reported in UN press release, *Commission on Human Rights adopts resolution on the situation of human rights in Myanmar, Sierra Leone…*, UN document HR/CN/00/52, 18 April 2000
198. Military's statement to the UN General Assembly 1998, *Statement by His Excellency, Minister for Foreign Affairs…in the General Debate of the Fifty Third Session of the United Nations General Assembly*, 30 September 1998, as reported on military's Geneva mission web-site <http://www3.itu.int/missions/myanmar/psmrr14.htm>
199. UN Charter, article 56: 'All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55'. Article 55 includes: 'the United Nations shall promote ... universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion'.
200. 'We fully subscribe to the human rights norms enshrined in the Universal Declaration of Human Rights. Here, I wish to underscore that the government does not condone any violations of human rights, and the type of democracy we envision will guarantee the protection and promotion of human rights', Myanmar Minister for Foreign Affairs (see note 191 above)
201. State Peace and Development Council, Law No 5/2000, *The Judiciary Law, 2000*, 27 June 2000, New Light of Myanmar newspaper
202. The military's *Constitutional Principles approved by the National Convention*, contained a chapter 'The Judiciary', comprising 19 sections dealing with the responsibilities, creation and termination of judges and courts. These are analysed in Myint Zan (see note 194 above)
203. Law No. 2/88, *The Judiciary Law*
204. Report of the UNCHR's Special Rapporteur on Burma, *Situation of human rights in Myanmar*, 24 January 2000, UN doc E/CN.4/2000/38, para 20
205. Amnesty International, *Myanmar: Justice on Trial*, 2003, <http://web.amnesty.org/library/print/ENGASA160192003> accessed 28 March 2004
206. Judiciary Law (note 202 above), art 3(a)
207. Judiciary Law (note 202 above), arts 3(b) and (c)
208. 'The Pyithu Hluttaw elects members of the Council of People's Justices from among those members of the Pyithu Hluttaw', 1974 Constitution, article 95(a). The 'Council of People's Justices' is the highest court in the country: art 103
209. 'The Council of People's Justices shall be responsible to the Pyithu Hluttaw', 1974 Constitution, art 104
210. Myint Zan (see note 194 above), pp23-24
211. The Constitution was to be interpreted with the interpretation 'law' controlled by Parliament (art 200 (a) and (b)) and the Parliament was permitted to 'publish interpretations of this Constitution from time to time as may be necessary': art 201.
'The validity of the acts of the Council of State, or of the Central or Local Organs of State Power under this Constitution shall only be determined by the Pyithu Hluttaw': art 200(c); see also Myint Zan (see note 194 above), p24
212. The State shall adopt a single-party system. The Burma Socialist Programme Party is the sole political party and it shall lead the State: art11
213. The sovereign powers of the State, legislative, executive and judicial reside in the people, comprising all national races whose strength is based on peasants and workers. The Pyithu Hluttaw, elected by citizens having the right to vote, exercises the sovereign power invested in it by the people and delegates to Organs of State Power in accordance with this Constitution': art 12.

'The Pyithu Hluttaw shall exercise the legislative power solely by itself while it may delegate executive and judicial powers to the Central and Local Organs of State Power formed under this Constitution': art 13.

214. Newspaper article, 'Passing fair judgments speedily in accord with law essential for firmness of judicial system', *New Light of Myanmar*, 21 December 1999, <http://mission.itu.ch/MISSIONS/Myanmar/99nlm/n991221.htm#(5)>, accessed 28 February 2004.
215. Newspaper article, 'Special Refresher Course No 3 for Judicial Officers Concludes', *New Light of Myanmar*, 19 February 2000.
216. 2000 report of the Special Rapporteur on Burma (see note 205 above), para 30
217. Speech of the SPDC Chairman, Senior General Than Shwe at an annual general meeting of the Association's annual, reported on military's website <www.myanmar.com/e-index/Union/solidarity/html>, accessed 1999/2000
218. As reported in Amnesty International, *Myanmar: Human Rights Developments July to December 1993*, <www2.amnesty.se/aidoc/external.nsf/0 a059b998242172d4802569a6006044af?OpenDocument&Click=>, accessed 28 March 2004
219. The Chief Justice chaired the Convention until 2003 when he became a Vice Chair: State Peace and Development Council, *Declaration No 10/2003*, 6 September 2003
220. As reported in National Council of the Union of Burma, *Burma Judicial Intervention*, statement to the 58th session of the UNCHR, April 2002, <www.ibiblio.org/obl/docs/chr2002briefing-judicial.htm>, accessed 28 March 2004
221. 'The State Peace and Development Council has permitted the following Supreme Court Justices to retire from duties', see Military's notice, *Information Sheet No. A-0694 (I)*, 15 November 1998, <www.myanmar-information.net/infosheet/1998/981115.htm>, accessed 22 March 2004
222. A UN report notes fears that legal proceedings brought by the National League for Democracy were pending before the Court and the military were unsure how the five judges would decide, so they were forced to retire: 2000 report of the Special Rapporteur on Burma (see note 205 above), para 21
223. 2000 report of the Special Rapporteur on Burma (see note 205 above), para 20
224. See, for example: 2000 report of the Special Rapporteur on Burma (see note 205 above); National Coalition Government of the Union of Burma, *Human Rights Yearbook 1998-99: Burma*, Thailand, July 1999, p60 (under the heading 'Denial of fair public trial', this reports on prisoners being held without trial, denial of legal representation during trial, military pressure on judicial officers, and lack of open hearings); in ICHRDD, *Burma: A Roadmap to Nowhere*, Rights & Democracy's Online Newsletter, March 2004, Issue 12; Amnesty International report, *Myanmar: Justice on Trial*, 2003 (compiled after visiting Burma and correspondence with the military, see section 'other concerns about impunity'); National Council of the Union of Burma (see note 221 above)
225. 'The courts [in Burma] have become a mere instrument to provide for formal and apparent, but clearly not substantive, legitimacy to the regime's systematic repression of the civil and political rights which constitute the very basis of the rule of law, democracy and democratic governance', 2000 report of the Special Rapporteur on Burma (see note 205 above), para 23
226. Xinhua News Agency, *Myanmar Court accepts prosecution against Government officials*, 29 September 1999;
also BK Sen, 'Commentary on the recent NLD litigation', 2000, Legal Issues on Burma Journal (No 6), Burma Lawyer Council, p55
227. One commentator explains that for the first 10-15 years after independence, Indonesia's judicial and parliamentary branches operated independently of the executive. But in the 'guided democracy' era under Soekarno, the separation of governmental branches was abolished and the President of the Supreme Court was appointed a cabinet minister. 'The position of judges in Indonesia is no more than of ordinary civil servant who are obliged to abide by the…law…on Government Employees', Adnan Buyung Nasution, 'Indonesia: Some challenges to the Independent of the Judiciary', in Centre for the Independence of Judges and Lawyers (see note 163 above), p53.
The failure of civil rights prosecutions in the Philippines after Marcos was mainly due to 'that country's corrupt and incompetent judiciary', G Robertson (see note 16

above), p262.
'The issue of corruption in the Philippine Judiciary is such that…[the current President Josef] Estrada, when he was still Vice-President…used the phrase "hoodlums in robes'", A Sarmiento (see note 19 above), p56

228. The military was also involved in the subsequent UN General Assembly meeting that endorsed the Vienna Declaration and called on states to act on its provisions: UN General Assembly resolution, *World Conference on Human Rights*, UN doc A/RES/48/121, 20 December 1993
229. Myanmar Minister for Foreign Affairs (see note 191 above)
230. As this article was being completed, the military refused entry to the UN Special Rapporteur in March 2004: Motion in Australian Parliament, Human Rights in Burma, Senate Hansard, 25 March 2004, p21748
231. Myint Zan (see note 194 above), p35
232. Assessment by Burmese lawyer, Mr BK Sen
233. 'Undoubtedly the greatest obstacle to fair trial, whether in a society transiting from dictatorship to democracy or one in which the old repressive order has suddenly collapsed, is corruption in the judiciary and weakness of the local legal profession… It is difficulty enough for transitional governments to reform the police and the army: invariably, they inherit judges with a vested interest in protecting the regime by which they were appointed', G Robertson (see note 16 above), pp261-262
234. UN Sub Commission document (see note 2 above), principle 32
235. UN Sub Commission document (see note 2 above), principle 32
236. Special Representative of the Secretary-General for human rights in Cambodia, *Situation of human rights in Cambodia*, UN doc E/CN.4/2000/109, 13 January 2000, para 33
237. R Burnside, *Rethinking Pacts*, <www.iir.ubc.ca/pwiasconferences/threatsto democracy/abstractspapers/submissionforspecial/ross.pdf>, accessed 29 February 2004
238. '[I]f an international arrest warrant is issued, Wiranto would not be able to travel outside Indonesia without risking arrest and extradition to East Timor', UN Wire, *U.N. Prosecutors In East Timor Seek Arrest Warrant For Wiranto*, <www.unwire.org/UNWire/20040323/449_14260.asp> accessed 24 March 2004.
239. UN Commission on Human Rights resolution, *Impunity*, UN doc E/CN.4/2003/RES/72, 25 April 2003, para's 13-17
240. G Robertson (see note 16 above), p253
241. T Golden, 'The Longest Arm of the Law', *Mother Jones* magazine, April 2004, p62
242. The attacks on US citizens in 2001 was an appalling act. Attention must, and is, being given to perpetrators of such attacks. This lies in the realm of policing, international relations and is not in the scope of this article. The human rights assessment of impunity and judicial independence focuses largely on government action and obligations.
243. Human Rights Watch, *Afghanistan: Abuses by U.S. Forces*, see <http://hrw.org/english/docs/2004/03/08/afghan8073.htm>, accessed 8 March 2004
244. BBC news 'First Guantanamo inmates charged', <http://news.bbc.co.uk/1/hi/world/americas/3518653.stm>, accessed 29 February 2004
245. BBC news, *'Delight' at release of Guantanamo men,* <http://news.bbc.co.uk/1/hi/uk/3500156.stm>, accessed 31 March 2004
246. US Government media release, *Transfer Of Afghani And Pakistani Detainees Complete*, <www.defenselink.mil/releases/2004/nr20040315-0462.html>, accessed 16 March 2004
247. ABC news 'US may hold acquitted Guantanamo inmates', <www.abc.net.au/news/newsitems/s1053741.htm>, accessed 29 February 2004.
248. See opinion by Rabinder Singh QC & Charlotte Kilroy, 'IN THE MATTER OF THE POTENTIAL USE OF ARMED FORCE BY THE UK AGAINST IRAQ AND IN THE MATTER OF RELIANCE FOR THAT USE OF FORCE ON UNITED NATIONS SECURITY COUNCIL RESOLUTION 1441', 15 November 2002, <www.cnduk.org/pages/binfo/opinion.html> accessed 22 March 2004. Also, <www.wslfweb.org/warandlaw.htm>, and <www.globalpolicy.org/security/issues/iraq/attack/lawindex.htm>
249. See S Zunes, *The Bush Administration's Attacks on the United Nations*, <www.globalpolicy.org/unitedstates/unpolicy/gen2003/0214atta.htm>, accessed 31 March

2004; Foreign Policy Association, *UN Risking Danger of Irrelevance?*, <www.fpa.org/newsletter_info2493/newsletter_info.htm> accessed 31 March 2003; ABC news, *Robert Hill attacks the Security Council*, <www.abc.net.au/pm/content/2003/s833037.htm>, accessed 22 March 2004

250. Baltimore Sun, *Bush details pre-emptive strike policy*, <www.baltimoresun.com/news/nationworld/iraq/bal-te.strategy21sep21,0,1764068.story?coll=bal-iraq-storyutil> accessed 31 March 2004; ABC news, *Blair wants more pre-emptive military strikes*, <www.abc.net.au/news/newsitems/s1060250.htm>accessed 31 March 2004; Sydney Morning Herald, *Pre-emptive strikes: PM weighs UN rules change*, 6 December 2002, <www.smh.com.au/articles/2002/12/05/1038950147512.html>